IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1154

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

JOSEPH JAMES,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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The History of the Case

By Kings County, New York, Indictment No. 4345/1975 filed on September 23, 1975, respondent Joseph James was accused of the crimes of Murder in the First Degree, two counts of Murder in the Second Degree, two counts of Attempted Murder in the Second Degree, four counts of Assault in the First Degree, Escape in the Second Degree and Criminal Possession of a Weapon in the Second Degree. The respondent was convicted of all counts in the indictment after a trial by jury and was, as required by New York law, sentenced to death (Rinaldi, *J.*).

Respondent perfected his appeal directly to the New York's highest court, the Court of Appeals, pursuant to New York Criminal Procedure Law, section 450.70(1). By remittitur and opinion both dated November 15, 1977, a closely divided court, by vote of four to three, with Chief Judge Breitel dissenting, modified the judgment of conviction by vacating the sentence of death and remanding for resentencing. Upon remand, New York State Supreme Court Justice Dominic R. Rinaldi stayed resentence pending the outcome of this petition for *certiorari*.

The New York State Attorney General, an intervenor party to the action in the New York Court of Appeals, joins the Kings County District Attorney in this petition, pursuant to New York State Executive Law, sections 63 and 71 and New York Civil Practice Laws and Rules section 1012 (b). (See also, Stern and Gressman, *Supreme Court Practice*, section 6.27, p. 282 (4th ed. 1969).)

Petitioners now apply for a Writ of Certiorari to the Court of Appeals of the State of New York to review the aforementioned order of that court.

Opinion Below

The opinion of the Court of Appeals is reported at 43 N.Y. 2d 17, N.E. 2d , N.Y.S. 2d (1977).

Jurisdiction

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3). (See also [*Harry*] *Roberts* v. *Louisiana*, 431 U.S. 633 (1977).)*

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* Hercinafter referred to as "[*H.*] *Roberts* v. *Louisiana.*"

Questions Presented

1. Whether New York's narrowly drawn First Degree Murder statute, construed together with defenses which provide opportunity to present mitigating circumstances at the guilt determination state at trial, renders New York's death penalty scheme, in its totality, consistent with the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. Whether respondent's individual status as one who was incarcerated and facing a life prison term and who intentionally killed a correction officer in effecting an escape renders New York's death penalty provisions pursuant to which he was sentenced constitutional as applied to him.

Constitutional Provisions at Issue

The Eighth and Fourteenth Amendments to the Constitution of the United States provide respectively in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

Statutes at Issue

"§ 60.06 Authorized disposition: murder in the first degree.

When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death." Added L. 1974, c. 367, § 2.

"§ 125.27 Murder in the first degree.

A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes the death of such person; and

(a) Either:

(i) the victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-1 felony." Added L. 1974, c. 367, § 5.

Statement of Facts

While incarcerated prior to trial on pending felony-murder charges for which he faced a possible life prison term (and for which he was eventually sentenced to life imprisonment), the respondent, Joseph James, arranged to have a gun, holster and a roll of tape "planted" in the bathroom of the dental clinic of the Kings County Hospital on the morning of September 9, 1975 by his onetime lover, Patricia Singleton. Later that morning the respondent was escorted into the clinic waiting area by uniformed Corrections Officers George Motchan and Joseph Connor. At his request, respondent was taken into the bathroom by

unarmed Officer Motchan, restrained only by handcuffs. After entering, respondent took the secreted items which had been left for him, but prematurely alerted Officer Motchan to his escape plan when he dropped the roll of tape.

Those in the waiting room heard scuffling, chains rattling and a door slamming inside the bathroom. Suddenly, the bathroom door opened and Officer Motchan, with the respondent behind him, ran out and hollered to Officer Connor: "Joe, watch it, he has a gun". Officer Motchan, who was partially out of the bathroom, was trying to get out completely and simultaneously close the door on the respondent behind him. A shot rang out and Officer Motchan fell to the floor with a fatal bullet wound in his back. As Officer Connor drew his gun, James, gun in hand, exited the bathroom and opened fire on him. Officer Connor could not use his weapon, however, because the excited and panicked people in the clinic waiting area were in his line of fire. Defenseless, Officer Connor ducked for cover behind the desk but quickly moved to avoid drawing fire upon a clerk who was already behind it.

Respondent continued shooting at Officer Connor, and finally, one of James' bullet hit him in the left arm and travelled through his shoulder and chest. After he collapsed on the floor, Officer Connor tried to reach for his gun, but before he could do so, the respondent shot him in the back. Mrs. Ann Nelson, an innocent bystander, who was sitting in a direct line with the bathroom door and who got up when the respondent opened fire was also shot in the back by him. With no other obstacles remaining, the respondent left the clinic and completed his escape.

After leaving the Kings County Hospital Clinic, James sought refuge in the apartment of Barbara Robinson, who, two months earlier, had been told by Miss Singleton that the

respondent would be going there. James explained his presence to Miss Robinson by stating clearly that he had escaped by shooting two corrections officers. The respondent proudly showed her the gun he had used and the five empty bullet casings. He told Miss Robinson that the bullets he had fired in his escape were designed to shatter vital human organs upon impact. Other testimony confirmed that respondent's gun had fired high-powered "soft point bullets" meant to expand upon impact.

When Miss Robinson told James that one of the corrections officers he had shot in the escape had died, he laughed. At no time during his ten day stay with Miss Robinson did he appear upset or distraught concerning the shooting. In fact respondent's desire to escape and his willingness, perhaps even eagerness, to kill any corrections officer who stood in his way was unmistakably reflected in a letter he had sent only days earlier to one of his prior girl friends, Deborah Smoak. The letter, the authenticity of which was stipulated to by defense counsel at trial, included the following telling statement:

> "I am very serious about what I am about to say, I am going to have an interview this week. I'm getting out of here or die trying. *And if I die trying, you know me, that I am going to take someone with me, like Earth* [sic Earp] [respondent's jargon for Officer].

Respondent was found guilty by jury verdict. He was subsequently sentended to death and perfected his direct appeal, as set forth above.

Summary of Argument

Petitioners contend that the principles set forth in the various death penalty cases decided by a plurality of this Court were incorrectly interpreted and applied by the court below. In ruling New York's death provisions unconstitutional, and thus vacating respondent's death sentence, the court failed to properly recognize that the New York statutory scheme takes into consideration possible "mitigating factors" by making them defenses to the substantive homicidal charge at trial. Hence, the statutory death scheme does not run afoul of constitutional limitations.

The New York Court of Appeals ruled that this Court's decision in [*H.*] *Roberts* v. *Louisiana, supra,* was "decisive" on the issue of the constitutionality of New York's death sentence provisions. Yet the court below failed to recognize that the State of Louisiana in [*H.*] *Roberts* v. *Louisiana, supra,* rigidly argued that its death statute (for the killing of a police officer) was constitutionally sufficient on its face, there being *no need for mitigating circumstances to be shown.* The constitutionality of the New York statute now before this court is properly founded upon a consideration of possible mitigating circumstances during the guilt determination stage at trial. Certainly then, the decision by this Court in *H. Roberts* v. *Louisiana, supra,* was not a proper basis for ruling the New York statute unconstitutional.

Moreover, in vacating respondent's death sentence, the court below overlooked the fundamental fact that, in any case, New York's death statute was constitutional as applied to respondent due to his individual status; i.e., because he was incarcerated and facing a life prison term when he killed a corrections officer he triggered an *exception* to the general rule that a death penalty cannot be imposed without specific consideration of mitigating circumstances.

These significant misconstruals of the Eighth and Fourteenth Amendments in an area of vital constitutional and societal importance it is submitted, merit correction by the Supreme Court.

POINT I

New York's death penalty provisions, in general and as applied to respondent, are consistent with the Eighth and Fourteenth Amendments.

A. New York's death penalty scheme provides for the constitutionally mandated consideration of possible mitigating circumstances during the guilt determination stage at trial. As such, the statutory scheme is consistent with this Court's recent decisions prohibiting mandatory death sentences.

The issue of the death penalty and a constitutional procedure by which it may be imposed has generated diverse and at times apparently conflicting opinions not only from this Court but now in New York's highest court as well. See e.g. [*H.*] *Roberts* v. *Louisiana,* 431 U.S. 633 (1977); [*Stanislaus*] *Roberts* v. *Louisiana,* 428 U.S. 325 (1976);* *Jurek* v. *Texas,* 428 U.S. 262 (1976); *Profitt* v. *Florida,* 428 U.S. 242 (1976); *Gregg* v. *Georgia,* 428 U.S. 153 (1976); *Furman* v. *Georgia,* 408 U.S. 238 (1972); *People* v. *Davis and James,* 43 N.Y.2d 17 (1977).** The court below, relying *solely* upon Federal constitutional standards (see 43 N.Y.2d at 30, 36, footnote 4) ruled the New York statutory death scheme unconstitutional because it felt this Court's decision in [*H.*] *Roberts* v. *Louisiana, supra,* to be "decisive" on the issue. *People* v. *James, supra,* at 32. Petitioners respectfully submit that neither that decision nor any prior decision of this Court can sustain the holding of the Court of Appeals.

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* Hereinafter referred to as "[*S.*] *Roberts* v. *Louisiana.*"
** Hereinafter referred to as "*People* v. *James.*"

The key flaw of the constitutional reasoning by the court below was its failure to recognize the vital difference between the features of the Louisiana statute struck down in the *Roberts* decisions and the totality of the New York death scheme now before this Court. Instead, the Court of Appeals chose to selectively interpret portions of this Court's language in [*H.*] *Roberts* v. *Louisiana, supra* (and the cases cited therein) in an unfairly rigid and hypertechnical manner.

In this regard, this Court can well recall that in its briefs in [*H.*] *Roberts* v. *Louisiana, supra,* the State of Louisiana did not *in any way* argue that its statute or scheme allowed or required a petit jury to consider, during the guilt phase of a trial, both aggravating and mitigating circumstances.* Accordingly, this Court ruled only upon the Louisiana scheme as argued and presented to it by the State of Louisiana in both *Roberts* cases. This Court did not, it would appear, in any way rule upon statutory death provisions such as the New York ones held unconstitutional by the court below.

Support for this view stems, in part, from portions of Justice Blackmun's dissenting opinion in [*H.*] *Roberts* v. *Louisiana, supra,* at 641, wherein he observed:

> "I should note that I do not read the *per curiam* opinion as *one* deciding the issue of the constitutionality of a mandatory death sentence for a killer of a peace officer for all cases and for all times.* * *

* During its oral argument before this Court in [*H.*] *Roberts* v. *Louisiana,* the State of Louisiana did passingly mention that some mitigating circumstances could be shown during the guilt phase of trial, but Roberts' counsel disputed this contention. Louisiana essentially argued that there was no necessity to afford opportunity to present mitigating circumstances, insisting that when a police officer is killed, there can be mitigating circumstances.

> Finally it is possible that a state statute that required the jury to consider, during the guilt phase of the trial, both the aggravating circumstance of killing a peace officer and relevant mitigating circumstances, would pass the plurality's test. *Cf. Jurek* v. *Texas,* 428 U.S. 262, 270-271 (1976). For me, therefore, today's decision must be viewed in the context of the court's previous criticism of the Louisiana system; * * *."

Certainly then, the majority of this Court has not categorically held that in all cases a statutory death scheme must provide for a minimum number of possible mitigating circumstances to be considered at the *post* guilt stage.*

Petitioners respectfully submit that not only have this Court's prior decisions *not* decided the issue posed by New York's death statute, but more importantly, those decisions are consistent with and supportive of the constitutionality of that statute. As Chief Judge Breitel, writing for the dissenting minority below, so incisively explained:

> "The Supreme Court has recognized . . . that mandatory capital punishment statutes applicable only in very special cases may not run afoul of constitutional limitations. It is not, however, necessary to decide whether all the categories of section 125.27 of the Penal Law constitute "special" cases, because the New York statute is not truly a "mandatory" capital punishment statute, as that term has been used by the Supreme Court.

* Although this Court was made aware of New York's mandatory death scheme by means of the New York *Amicus* Brief in the [*H.*] *Roberts* v. *Louisiana* litigation, no criticism was leveled against the New York statute in this Court's opinion in that case.

Crucial are the statutory defense of extreme emotional disturbance and the limitation on conviction of first degree murder to persons more than 18 years old. These mitigating circumstances are precisely the kind of factors, specific to the offense or the offender, which the Supreme Court has required to sustain capital punishment statutes (see, e.g., *Gregg v. Georgia*, 428 US 153, 193-195, n 44, *supra*). In fact, of the eight mitigating circumstances proposed by the Model Penal Code, and cited in *Gregg*, six are, in some manner, reflected in the New York statutory scheme: (1) extreme emotional disturbance is a defense to murder (Penal Law, § 125.27, subd 2, par [a]); (2) conduct causing or aiding another to commit suicide may not bring a conviction for murder (Penal Law, § 125.27, subd 2, par [b]); (3) justification for the killing is a defense (Penal Law, art 35); (4) duress is a defense (Penal Law, § 40.00); (5) lack of capacity by reason of mental disease or defect is a defense (Penal Law, § 30.05), and intoxication may negative the intent to commit first degree murder (Penal Law, § 15.25; *People v. Koerber*, 244 NY 147, 151-152; see *People v. Jackson*, 14 NY2d 5, 7-8); and (6) only those over 18 years of age at the time the crime was committed may be convicted of first degree murder (Penal Law, § 125.27, subd 1, par [b]). (See *Gregg v. Georgia*, 428 US 153, 193-194, n 44, *supra, quoting* ALI Model Penal Code, § 210.6 [Proposed Official Draft, 1962].)

It is notable that these are factors that the Supreme Court in the *Roberts (Harry)* case (431 US —, 97 S Ct 1993, 1995-1996, *supra*), relied on and quoted by the majority, stipulated as bearing upon the validity of a capital punishment statute. New

York's statutory scheme is even better in raising these factors to complete or partial defenses.

True, other capital punishment statutes sustained by the Supreme Court have provided for consideration of mitigating factors after the jury has convicted defendant of the substantive offense (*Gregg v. Georgia*, 428 US 153, 196-198, *supra; Proffitt v. Florida*, 428 US 242, 247-253; *supra; Jurek v. Texas*, 428 US 262, 268-274, *supra*). But there is no reason to assume that mitigating factors could not, instead, and even preferably, be built into the definition of the substantive offense. Indeed, the Supreme Court itself used similar analysis in *Jurek v. Texas*, indicating that narrowing the categories of murders for which capital punishment may be imposed serves much the same function as listing aggravating factors for the jury to consider (*supra*, p. 270). The situation is analogous where mitigating factors are involved. Certainly, if every possible mitigating factor were made a defense to the substantive crime, there would be little reason for the jury to consider mitigating factors in making a discretionary sentencing determination.

Section 125.27 of the Penal Law does not, of course, encompass every conceivable mitigating circumstance. But the Constitution does not require so much. It is essential only "that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense" (*Roberts* [*Harry*] *v. Louisiana*, 431 US —, —, 97 S Ct 1993, 1996, *supra*). Determining what circumstances are "relevant" must be a legislative, not

judicial, task, at least once it has been determined that the Legislature has in fact decided to consider mitigating factors.

Nor in justice to the Supreme Court should it be assumed that that court would harden for all time under constitutional standards all conceivable categories of mitigating circumstances or that all must be accorded recognition, or that the procedure for their recognition must follow a particular pattern laid down by the court. It has had much too much trouble with this very problem not to be more flexible. The very caveats and provisos in its most recent opinions make this point explicit so that it is not necessary to have recourse to inference. Moreover, that court addresses constitutional principles and does not purport to write or dictate a statutory criminal code.

To recapitulate, it has never been held that all mandatory capital punishment statutes violate the cruel and unusual punishment clause of the Constitution. At least in a narrowly drawn category of special cases, a category which may be broad enough to include the entire New York statute, failure to provide for consideration of mitigating factors does not make a capital punishment statute constitutionally defective. But, in any event, the New York statute, although written in mandatory terms, is not embracively mandatory in that it does not encompass, indiscriminately and without consideration of mitigating factors, a mass aggregation of crimes. Thus, since section 125.27 of the Penal Law does require the jury to consider mitigating factors as elements of the substantive crime of first degree murder, there is no constitutional violation." *People v. James, supra* at pp. 42-45.

Thus, the New York statutory death scheme provides for the constitutionally mandated consideration of possible mitigating circumstances at the guilt determination stage at trial. Since such a legislative construct is consistent with this court's plurality decisions concerning mandatory death statutes, the court below clearly erred in holding the New York statute unconstitutional and in vacating and modifying the respondent's death sentence.

B. Even assuming, *arguendo*, that the New York death statute is deemed "mandatory," the Court of Appeals below erred in vacating and modifying respondent's sentence. Because respondent killed a corrections officer while incarcerated prior to trial and facing a life prison term, New York's death penalty provisions, pursuant to which he was sentenced were constitutional as applied to him.

Even assuming, *arguendo,* that the New York death statute is considered "mandatory" and thus unconstitutional in the general sense, respondent's death sentence should nonetheless have been affirmed by the court below.

Respondent was sentenced to death because of the interplay of New York Penal Law Section 125.27(1)(a)(ii)'s "the victim was an employee of a state correctional institution" language and the *actual* factual circumstance that respondent killed a correctional employee while under indictment for Murder in the Second Degree, a class A-1 felony for which respondent faced and was eventually sentence to a maximum term of life imprisonment. (Penal Law section 70.00(2).) The petitioners submit that under the facts of *this* case, this Court should construe the challenged death provisions narrowly so as to render them constitutional and accordingly reinstate the sentence of death imposed by the trial court.

Rather than analyze the narrow application of the death statute to the respondent, the court below held broadly that

the Penal Law section 125.27 is unconstitutional because it does not provide for "consideration of relevant and particularized mitigating factors" (43 N.Y.2d at 37). While it is true that *generally* such "particularized consideration" is a constitutionally indispensable part of the process of inflicting the penalty death" (*Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976)) the court below failed to meaningfully address the strong qualifying and restrictive language in *Woodson* and later cases which is crucial to a determination of the constitutionality of the New York statute as applied to respondent. This Court's plurality opinion in *Woodson* states unequivocally that its conclusions and its language concerning the mandatory North Carolina death statute do not necessarily apply to more narrowly addressed statutes:

> "This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner, serving a life sentence, defined in part in terms of the character or record of the offender. *We thus express no opinion regarding the constitutionality of such a statute.* See n. 25 *infra*." Id. at 287, fnte. 7 (emphasis added).

The import of the language in *Woodson* of "defined in large part in terms of the character or record of the offender" is clarified by reading it in conjunction with the case of [*S.*] *Roberts* v. *Louisiana, supra.* There this Court explained:

> "Only the third category of the Louisiana first degree murder statute, covering intentional killing by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. *Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify said laws . . .*" 428 U.S. 329-33 (emphasis added).

Thus this Court, although repeatedly striking down mandatory death penalties, carefully reserved judgment in instances such as the case at bar in which the narrow category of offender includes an inmate who might feel he stands to *lose nothing* should he commit murder.

In fact, in its historical review of mandatory death schemes across this country, this Court in *Woodson* v. *North Carolina, supra,* observed that statutes concerning homicide committed by incarcerated defendants were among the few mandatory death statutes frequently found in the pre-*Furman* era. Significantly, this Court reserved finding such statutes unconstitutional in its holding in *Woodson*:

> "The only category of mandatory death sentence statutes that appears to have had any relevance to the actual administration of the death penalty in the years preceding *Furman* concerned the crimes of murder or assault with a deadly weapon by a life-term prisioner. Statutes of this type apparently existed in five States in 1964. . . . In 1970, only five of the more than 550 prisoners under death sentence across the country had been sentenced under a mandatory death penalty statute. Those prisoners had all been convicted under the California statute applicable to assaults by life-term prisoners. . . . *We have no occasion in this case to examine the constitutionality of mandatory death sentence statutes applicable to prisoners serving life sentences.*" 428

U.S. at 292, fnte. 25; citations omitted (emphasis added).

Perhaps most important in this regard is this Court's decision in [*H.*] *Roberts* v. *Louisiana, supra.* Having once before struck down Louisiana's mandatory death statute in [*S.*] *Roberts* v. *Louisiana, supra,* this Court pithily emphasized that even the intentional murder of a police officer did not warrant a statute that did not consider relevant "mitigating circumstances." Yet this Court in *two* separate parts of its brief opinion *again* reserved judgment where "the unique problem" of a prisoner serving a life sentence is involved (431 U.S. 632, fnte. 2, 637, fnte. 5).

This Court's conscious decision in *Woodson* v. *North Carolina, supra,* and its progeny to exclude from its blanket disapproval of mandatory death schemes those provisions aimed at deterring those who believe they have nothing left to lose was well-founded and necessary. It may well be that there can be no effective deterrence to one already serving a life prison term *except* the knowledge that the intentional killing of a corrections officer *will without question* result in his execution. The deterrent effect would be especially keen in those instances where a prisoner might choose to kill a corrections officer in order to escape.

Petitioners submit that there is no constitutionality significant distinction between this Court's explicit "lifer exception" and the case at bar. There can be no substantially different deterrent effect upon one already sentenced to a life term of imprisonment from one presently incarcerated, perhaps convinced that the case against him is overwhelming, and facing a life prison term. Indeed Chief Judge Breitel, dissenting below, observed:

> "The life prisoner presents a special case, according to the Supreme Court, because there may be no satisfactory deterrent other than the death penalty. But the Court did not hold that only in a case of a life prisoner may a mandatory capital punishment statute be applied. Only a weak imagination would fail to perceive other cases just as special as that of the life prisoner. For instance, belief that a soldier is frightened of death and considering desertion in time of war may justify the threat of capital punishment to keep him at his station. *And, of course, a prisoner like appellant James in the instant case, not yet sentenced to life imprisonment, but facing a murder charge which could well bring upon him such a sentence, presents a case no different from that of a life prisoner.*" *People* v. *James, supra,* at 43.

The certainty of death for the murder of a corrections officer, during a desperate escape for example, may deter some, though not all, such homicides. "[T]here are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate." *Gregg* v. *Georgia, supra* at 186; footnote omitted. And the judgment of the New York Legislature that such a death scheme is necessary should not be overruled since the "value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with legislatures . . ." (*Id.*)

Thus, not only is New York's death statute constitutional due to the consideration of possible mitigating circumstances at trial but, in addition, the statute's specific provisions as applied to respondent are independently constitutional and may be narrowly construed as such. See e.g. *Bigelow* v. *Virginia,* 421 U.S. 809, 816, (1975); *Broderick* v. *Oklahoma,* 413 U.S. 601 (1973); *Dombrowski* v. *Pfister* 380 U.S. 479 (1965).

• • •

We submit, then, that the court below fundamentally misconstrued the principles set forth in this Court's numerous death penalty decisions in its holding unconstitutional New York's statutory death scheme and its vacateur and modification of respondent's sentence to death. As such the order below should be reversed.

POINT II

The determination by the New York Court of Appeals that the Eighth and Fourteenth Amendments render unconstitutional New York's death penalty scheme both generally and as applied to respondent has so significantly misconstrued constitutional principles of vital constitutional and societal importance as to make this case worthy of review by the Supreme Court.

As demonstrated in Point I, *supra*, the holding of the New York Court of Appeals below was erroneous under federal constitutional law upon which it was solely decided. Petitioners recognize that not every State case wrongly decided under the Constitution is deserving of review by the Supreme Court. We submit, however, that the degree to which the opinion below has distorted the principals of the Eighth and Fourteenth Amendments in an area of vital societal importance renders appropriate a review of this case by the Supreme Court.

This nation's continuingly intense concern for appropriate and effective deterrence, as well as punishment, to those who would choose intentionally to kill is well reflected by the events of recent years. In the wake of *Furman* v. *Georgia*, *supra*, decided in 1972, state legislatures across the country attempted to bring their statutory death schemes in line with what they perceived to be evolving constitutional guidelines. In 1976, this Court reexamined

the concept of the death penalty and held that it was not per se cruel and unusual. *Gregg* v. *Georgia, supra* at 187. In five separate plurality opinions this Court analyzed historical and contemporary attitudes and concluded that the legislative response to *Furman* indicated a clear societal endorsement of the death penalty. *Id.* at 29 fnte.23. Yet this Court's decisions of 1972 and 1976 as well as the more recent decision in [*H.*] *Roberts* v. *Louisiana, supra*, have not given clear guidance to state legislatures concerning the specific type of penalty construct that will satisfy the constitutionally mandated consideration of possible mitigating circumstances.

For all that has been said and all that has been written, it is clear from the discussion in Point I, *supra*, that this Court has not addressed itself to a statutory death scheme that allows mitigating circumstances to be proferred and weighed at the guilt determination stage as opposed to the post verdict stage at trial. And, it is in fact this ambiguity in the decisions and reasoning of this Court that brings the petitioners here in our *Writ of Certiorari*.

Significantly, the problems posed by the error of the court below transcend the mere constitutionality of respondent's sentence in this case. Society's vital interest in the death penalty makes inevitable the conclusion that the problem posed by this case will be a recurring one. Even now individual states across the country are in the process of refashioning their statutory death penalty provisions to comport with the new guidelines of this Court. Yet remaining unanswered is the question of the constitutionality of any such statutes which provide for mitigating circumstances to be considered at the guilt determination stage. Surely, an examination by this Court of the merits of the case at bar will give significant guidance to those legisla-

tures and may well avoid repeated and lengthy litigation on the constitutional ambiguities which yet exist.

An additional recurring question posed by this case is the specific parameters of what has been denominated as the "lifer-exception" to this Court's blanket prohibition to mandatory death provisions. This Court has pointedly and repeatedly emphasized that an intentional murder by one already serving a life prison term suggests a "unique" problem which *may* justify a mandatory death penalty deterrent. State legislatures are now *without any guidance* in this regard for they do not know whether this Court would *in fact* recognize a "lifer-exception". Moreover, if such a "lifer-exception" is constitutionally acceptable it is unclear what specific category of prisoner the exception may embrace. If it is true that "lifer-exception" is valid because no deterrent other than a mandatory penalty will work with an individual already serving a life term, then it is equally applicable to the prisoner facing a life prison term as was the situation of the respondent herein. Regrettably, at this time, state legislatures are without guidance from this Court on the appropriate, constitutionally acceptable, deterrent to those prisoners for whom a life-sentence would be no deterrent at all.

Petitioners respectfully submit that the Supreme Court review this case not only in order to correct the error in the court below, but more importantly, to give guidance to legislatures across the nation concerning ambiguities in the case law surrounding the imposition of the death penalty. This case provides an ideal and timely vehicle for this Court to announce that where the death sentence may be imposed the process of examining possible mitigating circumstances can be accomplished at the guilt determination stage at trial. Equally important, by granting the Writ of Certiorari this Court will be in a position for the first time of delineating

the constitutional parameters of the "lifer-exception" so that state legislatures may draft needed legislation accordingly.

Surely then, this case provides a needed opportunity for the Supreme Court to speak on issues of vital constitutional and societal importance.

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be granted.

Dated: Brooklyn, New York
February, 1978

Respectfully submitted,

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APPENDICES

APPENDIX A

Order of Remittitur of the New York Court of Appeals Vacating and Modifying Respondent's Sentence

COURT OF APPEALS

STATE OF NEW YORK

The HON. CHARLES D. BREITEL, *Chief Judge*, Presiding

No. 467

—o—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

JOSEPH JAMES,

Appellant.

—o—

The appellant(s) in the above entitled appeal appeared by James W. B. Bankard; the respondent(s) appeared by Eugene Gold, District Attorney of Kings County.

The Court, after due deliberation, orders and adjudges that the judgment is modified and the case remitted to Supreme Court, Kings County, for resentencing in accordance with the opinion herein and, as so modified, affirmed. Opinion by Cooke, J. All concur except Breitel, Ch. J., who dissents and votes to affirm in an opinion in which Jasen and Gabrielli, JJ., concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Kings County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA

.....

JOSEPH W. BELLACOSA, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 15, 1977.

APPENDIX B

Opinion of the New York Court of Appeals in Support of the Order of Remittitur Vacating and Modifying Respondent's Sentence

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSEPH DAVIS, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSEPH JAMES, Appellant.

Argued September 7, 1977; decided November 15, 1977

SUMMARY

APPEAL, in the first above-entitled action, from a judgment of the Supreme Court (HOWARD A. JONES, J.), rendered December 15, 1975 in Westchester County, upon a verdict which convicted defendant of murder in the first degree, robbery in the first and second degrees and criminal possession of a weapon.

APPEAL, in the second above-entitled action, from a judgment of the Supreme Court (DOMINIC S. RINALDI, J.), rendered November 22, 1976 in Kings County, upon a verdict which convicted defendant of murder in the first degree, murder in the second degree, attempted murder in the first degree, assault in the first degree, escape in the second degree, and criminal possession of a weapon in the second degree.

The trial court in each case sentenced the respective defendants to death as required by sections 60.06 and 125.27 of the Penal Law.

The Court of Appeals (COOKE, J.) held in the first above-entitled action that the facts do not support guilt of murder in the first degree, since there is doubt whether the murder victim was acting within the scope of his duty as a police officer, and the court, accordingly, modified the judgment, vacating the sentence of death and remitting the case for resentencing for murder in the second degree. The court found the defendant in the second above-entitled case to be guilty of murder in the first degree and held that the mandatory death penalty for killing a corrections officer is invalid under United States Supreme Court rulings, since there is no provision for a consideration of mitigating factors or information pertaining thereto, and the court, accordingly, modified, vacating the death penalty and remitting for resentencing for murder in the second degree.

HEADNOTES

Crimes — Identification of Defendant

1. Under the circumstances that a witness identified an exhibit as "sup-

posed to be the photograph of the robber" and said that the photo and another were distorted from pictures he had seen on a viewing screen, that "[t]hese are not the guys I picked" and that "these are the photographs they handed me as being the robber here and the shooter here, and I disagreed * * * [b]ecause of the facial features, that they're wrong", it cannot be said that the rejection of the exhibit was error.

Crimes — Evidence — Admissibility

2. A party's attempt to procure false testimony or to corrupt a witness, though collateral to the issues, is competent as an admission by acts and conduct that the party's case is weak and its evidence dishonest, and the fact that evidence was fabricated is admissible even though the evidence itself was not used.

District and Prosecuting Attorneys — Prosecutorial Misconduct

3. There is no indication, much less proof, of falsification on the part of the police or misconduct such as bribery of a witness nor any "fastening" of such wrongdoing to the prosecution based upon a witness' testimony that a statement was taken from him under duress, where the signed statement was not offered or received in evidence.

Evidence — Relevance

4. Relevant evidence is evidence having any tendency in reason to prove any material fact and tending to convince that the fact sought to be established is so.

Evidence — Probative Value

5. Even if evidence is proximately relevant, it may be rejected if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties.

Crimes — Collateral Issues — Prejudice

6. Since an attempt by the defense to introduce a witness' testimony that he was coerced to make a statement, not offered in evidence by the People, was for the obvious purpose of creating the impression that a substantial portion of the prosecution's proof was tainted in a fashion similar to the proffered account, the probative value of the testimony could be outweighed by dangers that the main issue would be obscured by prolongation of trial and by the solid possibility of undue prejudice to the prosecution, and, accordingly, the discretion of the trial court was not abused.

Crimes — Evidence — Newly Discovered Evidence

7. There is no merit to defendant's assertion of error because of the denial of a new trial, since the newly discovered evidence which formed the basis of the motion would be relevant only if one accepted the alibi testimony of defendant, his relatives and friends, which proof was not accepted by the jury, and since defense counsel was aware of the evidence during trial.

Crimes — Murder — Killing of Police Officer in Line of Duty

8. While the facts support a conviction of the crime of murder in the second degree, proof of guilt beyond a reasonable doubt as to all of the elements of the crime of murder in the first degree is not made out by a

showing that defendant killed a policeman who asserted that he was an officer when restrained by defendant from leaving a supermarket on his way to report for duty, since there continues to be doubt concerning whether the victim was acting in the line of duty when he was killed, which is one of the elements of murder in the first degree as specified by the Legislature.

Crimes — Murder — Death Penalty

9. There is proof beyond a reasonable doubt of guilt of murder in the first degree of a defendant who, while attempting to escape custody, shot a corrections officer, and defendant, accordingly, comes within New York's death penalty statute which provides a mandatory death sentence for all persons over 18 years of age found to have intentionally caused the death of a police officer or a State or local corrections facility officer in the line of duty, where defendant knew or had reason to know the victim was such an officer or employee, or caused the death of anyone if defendant was confined or in custody for a life term or upon an indeterminate sentence with a maximum of life and a minimum of at least 15 years or if defendant had escaped from such confinement or custody and had not yet been returned.

Statutes — Presumption of Constitutionality

10. State statutes imposing the death penalty for first degree murder (Penal Law, §§ 60.06, 125.27) carry with them a strong presumption of constitutionality and should be stricken as unconstitutional only as a last resort without substitution of the judgment of the courts for that of the Legislature as to the wisdom and expendiency of the legislation.

Courts — Supreme Court Rulings

11. The court is bound by rulings of the United States Supreme Court as to the validity of State statutes under the United States Constitution.

Constitutional Law — Mandatory Death Penalty — Circumstances

12. Unconstitutionality of New York's death penalty statute for murder of a corrections officer (Penal Law, §§ 60.06, 125.27, subd 1, par [a], cl [ii]) is indicated by the fact that the statute provides neither for the furnishing of information, without which there can be no consideration of the individual offender and the circumstances of a particular offense, nor standards to guide the sentencing authority in the use of that information had it been furnished.

Constitutional Law — Mandatory Death Penalty — Mitigating Factors

13. Since the New York death penalty statute for murder of a corrections officer (Penal Law, §§ 60.06, 125.27, subd 1, par [a], cl [ii]) "does not allow consideration of particularized mitigating factors" for purposes of "the capital sentencing decision" as to "the particular offender", it is unconstitutional.

Constitutional Law — Mandatory Death Penalty — Mitigating Factors

14. Although the statutory framework of New York's death penalty statute for murder of a corrections officer (Penal Law, §§ 60.06, 125.27, subd 1, par [a], cl [ii]) may in some manner reflect various mitigating factors as defenses, that is not enough to save New York's death penalty statute from constitutional infirmity, since similar defenses are found in other jurisdictions, including those whose death penalty statute has been held unconstitutional by the Supreme Court, and such limitations do not afford individualized consideration of the offender because defenses relate to guilt or inno-

cence, whereas a mitigating factor may be of no significance to a determination of criminal culpability and will not rise to the level of a defense.

Crimes — Mandatory Death Penalty — Mitigating Factors

15. The defenses under New York's death penalty statute for murder of a corrections officer (Penal Law, §§ 60.06, 125.27, subd 1, par [a], cl [ii]) do not allow an individualized consideration of the character, propensity, record or attributes of the individual offender as required by the Supreme Court, since the defenses simply do not present the required information and do not permit a jury which has rejected these defenses and has found a defendant guilty of murder in the first degree to then mitigate the punishment by resurrecting the defenses.

Crimes — Capital Cases — Scope of Review

16. Under the State Constitution, in capital cases in which the sentence of death has been imposed, the Court of Appeals is vested with the power to and must review the facts (NY Const, art VI, §§ 3, 5) to determine their sufficiency to make out a case of murder beyond a reasonable doubt and determine that the evidence is of such weight and credibility that the jury was justified in finding the defendant guilty beyond a reasonable doubt.

Constitutional Law — Mandatory Death Penalty — Constitutionality

17. Under the United States Constitution, the death penalty is not per se unconstitutional.

TOTAL CLIENT-SERVICE LIBRARY* REFERENCES*

CLS, Penal Law §§ 60.06, 125.27
21 Am Jur 2d, Criminal Law §§ 595, 613; 40 Am Jur 2d, Homicide §§ 549–557

ANNOTATION REFERENCE

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death—post-Furman decisions. 71 ALR3d 453.

* By the Publisher's Editorial Staff.

POINTS OF COUNSEL

James J. Duggan and *David E. Kendall* for appellant in the first above-entitled action. I. Defendant's guilt was not proved beyond a reasonable doubt. *(People v Dillon,* 197 NY 254; *People v Patterson,* 39 NY2d 288; *Matter of Winship,* 397 US 358; *Cool v United States,* 409 US 100; *Ivan v City of New York,* 407 US 203; *Mullaney v Wilbur,* 421 US 684; *Speiser v Randall,* 357 US 513.) II. The court erred in having refused to admit People's Exhibit 35 into evidence. III. It was error to have refused to allow the witness Smith to testify. *(Chambers v Mississippi,* 410 US 284; *Washington v Texas,* 388 US 14;

Cool v United States, 409 US 100; *Herring v New York,* 422 US 853.) IV. It was error to have denied defendant's motion for a new trial. *(People v Moltesen,* 282 App Div 1090.) V. At the time of the shooting, the victim was not acting as a police officer. VI. The statute fixing death as the punishment for the murder of a police officer is unconstitutional. *(Barbier v Connolly,* 113 US 27; *Barrett v Indiana,* 229 US 26.) VII. The death penalty statute under which appellant was condemned is unconstitutional. *(People v Fitzpatrick,* 32 NY2d 499; *Furman v Georgia,* 408 US 238; *Woodson v North Carolina,* 428 US 280; *Roberts v Louisiana,* 428 US 325; *Williams v Oklahoma,* 428 US 907.)

Carl A. Vergari, District Attorney (B. Anthony Morosco and *Janet Cunard* of counsel), for respondent in the first above-entitled action. I. Defendant's guilt was proved beyond a reasonable doubt. II. Defendant's claim of newly discovered evidence does not justify a new trial. III. It was not error to refuse to admit People's Exhibit 35 into evidence. IV. It was not error to have barred the witness Smith from giving irrelevant, immaterial and prejudicial testimony. *(People v Sapia,* 41 NY2d 160.) V. The victim was acting as a police officer at the time of the shooting. VI. The New York death penalty is constitutional. *(People v Fitzpatrick,* 32 NY2d 499; *Gregg v Georgia,* 428 US 153; *Furman v Georgia,* 408 US 238; *Woodson v North Carolina,* 428 US 280; *Winston v United States,* 172 US 303; *Williams v New York,* 337 US 241; *McGautha v California,* 402 US 183; *Roberts v Louisiana,* 428 US 325; *Washington v Louisiana,* 428 US 906; *Jurek v Texas,* 428 US 262; *Proffitt v Florida,* 428 US 242.)

Louis J. Lefkowitz, Attorney-General (Jules E. Orenstein and *Samuel A. Hirshowitz* of counsel), in his statutory capacity under section 71 of the Executive Law in the first above-entitled action. New York's death penalty is constitutional. *(People v Patterson,* 39 NY2d 288; *Furman v Georgia,* 408 US 238; *People v Fitzpatrick,* 32 NY2d 499; *Gregg v Georgia,* 428 US 153; *Proffitt v Florida,* 428 US 242; *Jurek v Texas,* 428 US 262; *Woodson v North Carolina,* 428 US 280; *Roberts v Louisiana,* 428 US 325; *McGautha v California,* 402 US 183; *Green v Oklahoma,* 428 US 907.)

James W. B. Benkard and *Phebe C. Miller* for appellant in the second above-entitled action. I. Appellant's guilt as to the count of murder in the first degree was not proved beyond a

reasonable doubt. *(People v Horton,* 18 NY2d 355; *People v Jackson,* 18 NY2d 516.) II. The court's *Sandoval* ruling, allowing cross-examination of appellant concerning certain prior charged but not proven offenses, constituted prejudicial error requiring a retrial. *(People v Sandoval,* 34 NY2d 371; *People v Branch,* 34 AD2d 541, 27 NY2d 834; *People v Carmack,* 52 AD2d 264; *People v Mallard,* 78 Misc 2d 858; *Gordon v United States,* 383 F2d 936; *Jackson v Osborn,* 2 Wend 555; *People v Cascone,* 185 NY 317; *People v Balsano,* 51 AD2d 130; *People v Porter,* 47 AD2d 908; *People v Hepburn,* 52 AD2d 958.) III. The trial court violated the principles of *Witherspoon v Illinois* in dismissing six veniremen. *(Witherspoon v Illinois,* 391 US 510; *Taylor v Louisiana,* 419 US 522; *Woodson v North Carolina,* 428 US 280; *Boulden v Holman,* 394 US 478; *Maxwell v Bishop,* 398 US 262; *Wilson v Florida,* 403 US 947; *Wigglesworth v Ohio,* 403 US 947; *Harris v Texas,* 403 US 947; *Davis v Georgia,* 429 US 122; *Adams v Washington,* 403 US 947.) IV. The death penalty provisions under which appellant was sentenced are unconstitutional. *(People v Velez,* 88 Misc 2d 378; *Woodson v North Carolina,* 428 US 280; *Roberts v Louisiana,* 428 US 325; *Williams v Oklahoma,* 428 US 907; *Furman v Georgia,* 408 US 238; *People v Fitzpatrick,* 32 NY2d 499; *Williams v New York,* 337 US 241; *Jurek v Texas,* 428 US 262; *Mullaney v Wilbur,* 421 US 684; *People v Patterson,* 39 NY2d 288.)

Eugene Gold, District Attorney (Michael S. Ross of counsel), for respondent in the second above-entitled action. I. The evidence was sufficient to support the jury's verdict and no reversible error was committed by either the court or the prosecutor. *(People v Cerullo,* 18 NY2d 839; *Moccio v New York,* 387 US 946; *People v Monaco,* 14 NY2d 43; *People v Mullin,* 41 NY2d 475; *People v McQueen,* 18 NY2d 337; *People v Horton,* 18 NY2d 355, 387 US 934; *People v Bracey,* 41 NY2d 296; *People v Drees,* 53 AD2d 735; *People v Agron,* 10 NY2d 130; *People v Schmidt,* 168 NY 568; *People v Robinson,* 36 NY2d 224; *United States v Larsen,* 525 F2d 444, 423 US 1075.) II. The trial court properly exercised its discretion in excusing six veniremen. *(Witherspoon v Illinois,* 391 US 510; *People v Boulware,* 29 NY2d 135; *United States v Hall,* 536 F2d 313; *People v Culhane,* 33 NY2d 90; *People v Biondo,* 41 NY2d 483; *United States v Gay,* 522 F2d 429.) III. The death penalty provisions pursuant to which appellant was sentenced and as applied to him are constitutionally unassailable. *(Peo-*

ple v Broadie, 37 NY2d 100, 423 US 950; *Gregg v Georgia,* 428 US 153; *Furman v Georgia,* 408 US 238; *Woodson v North Carolina,* 428 US 280; *Roberts v Louisiana,* 428 US 325; *People v Kaiser,* 21 NY2d 86; *People v Barber,* 289 NY 378.)

Louis J. Lefkowitz, Attorney-General (Jules E. Orenstein and *Samuel A. Hirshowitz* of counsel), in his statutory capacity under section 71 of the Executive Law in the second above-entitled action. New York's death penalty is constitutional. *(People v Patterson,* 39 NY2d 288; *Furman v Georgia,* 408 US 238; *Gregg v Georgia,* 428 US 153; *Proffitt v Florida,* 428 US 242; *Jurek v Texas,* 428 US 262; *Woodson v North Carolina,* 428 US 280; *Roberts v Louisiana,* 428 US 325; *People v Kaiser,* 21 NY2d 86; *Berger v New York,* 388 US 41; *People v Epton,* 19 NY2d 496, 390 US 29.)

Sara Halbert and *Bruce J. Ennis* for New York Civil Liberties Union, *amicus curiae,* in the second above-entitled action. I. Section 60.06 of the Penal Law violates the Eighth Amendment to the United States Constitution. *(Roberts v Louisiana,* 428 US 325; *Woodson v North Carolina,* 428 US 280; *Williams v Oklahoma,* 428 US 907.) II. Section 60.06 of the Penal Law violates section 5 of article I of the New York State Constitution. *(Trop v Dulles,* 356 US 86; *Weems v United States,* 217 US 349; *Furman v Georgia,* 408 US 238; *McGinnis v Royster,* 410 US 263; *Tigner v Texas,* 310 US 141.)

OPINION OF THE COURT

COOKE, J.

In the setting of these two appeals, in each of which defendant has been sentenced to death, we are called upon to determine the constitutionality of New York's death penalty statute—a legal issue—not to express our views as to whether such a statute, granted that it is constitutional, is wise or advisable—a legislative concern.

I

Defendant Joseph Davis appeals directly from a judgment of the Supreme Court, Westchester County, convicting him, after a jury trial, of murder in the first degree, two counts of robbery in the first degree, two counts of robbery in the second degree and criminal possession of a weapon in the second degree, and sentencing him to death for the crime of

murder in the first degree and to various indeterminate terms for the other crimes.

At about 10:30 P.M. on September 17, 1974, Officer Harold Woods of the Yonkers Police Department was in plain clothes and on his way to report for duty when he stopped at an A & P in Yonkers for a container of milk. As he attempted to leave the market, one of two men who were in the process of robbing the place stopped him. When Woods identified himself as a policeman, the robber shot him in the neck causing his death five days later. Favia, the assistant manager of the A & P, testified that a man approached him, produced a gun, directed him to the cashier's booth where Mary Cahill was preparing the night's deposit and then ordered them to put money into a canvas bag which he carried. While placing money in the sack, Favia heard a shot at the front of the store and a voice saying "Come on, man, we have to get out of here." Kevin Wynne, the boyfriend of Mary Cahill, related that another man, whom he identified as defendant, stood by the door; that, when a customer attempted to leave, defendant pushed him back; and that, when the customer proceeded forward again, inquired what was going on and said he was a cop, defendant took out a gun and shot him. Mary Cahill swore that, after she and Favia had placed over $5,000 into the bag, she heard a man near the front doors say "Oh, you're a cop", followed by an expletive and then a shot. Charlie Cola, a produce clerk, testified he saw defendant push a man in the front entrance area and say "Get back in there", that defendant pushed the man again saying "Get back into the store", that the man said "What are you doing? I'm a cop" and that defendant then shot him. Ann Ringler, a checker, heard a "pop" by the door, looked over and saw a man fall to the floor bleeding with defendant standing over him. Melvin Jones, an FBI informer, took the stand and stated that on September 18, 1974 he was at a bar in Manhattan when defendant and "Bo" Perkins appeared, that they told him they did something and had just "wasted" a guy up in Yonkers or Mount Vernon, that they both had .38 revolvers and money, that defendant gave him a $50 bill and also gave money to Lu, the owner of the bar who was defendant's girl friend.

Defendant testified in his own behalf. He recalled that he flew to New Orleans on a Delta Airlines flight on September 6, 1974, that the plane arrived there in the evening and was met by defendant's first cousin, Arthur Johnson. He stated that at

no time did he leave the New Orleans or Napoleonville areas of Louisiana during the period ensuing from his arrival until his arrest on September 28, 1974 and that while at New Orleans he worked with Mitchell Romar as an auto mechanic. He denied being in the City of Yonkers on September 17, that he had killed a police officer on that day and that he had met Jones during the interval in question. Arthur Johnson and his wife testified as to defendant's living with them while in New Orleans and specifically that he was in their home both on September 17 and September 18 at the times mentioned. Arthur Johnson told of defendant's work with Romar. Romar swore that on September 17 and 18 he had worked with defendant. Lucia Thompson, the owner of the Manhattan bar, testified that the last she saw defendant prior to trial was on September 6, 1974 when he enplaned to New Orleans, that she did not see him on September 17 or 18 and that he did not give her any money from September 6, 1974 through the remainder of that month.

On rebuttal, Danny Mese testified that on September 17 he saw a tow truck operated by a man named Mitchell and that he did not see anyone with him. A Delta Airlines stewardess testified she saw defendant on a flight from New Orleans to New York on September 11, 17 or 23.

[1] Defendant contends that it was error for the court not to admit into evidence, unconditionally on his offer, a photograph identified as People's Exhibit 35. Utilizing a device creating a photo montage incorporating certain features of a suspect which is then projected upon a screen, Wynne assisted in the construction of two images resembling the two men involved in the A & P robbery—"[f]irst * * * the robber" and "then the shooter". Photographs were then taken of each projection in the same order. When asked what Exhibit 35 was, Wynne responded: "It's supposed to be the picture of the man that shot the police officer." He stated that the exhibit was not a photographic reproduction of the picture that was on the screen, differing in that "like the face blew up. The cheeks were larger. Like the eyebrows became lighter. As you can see, there was like a glare on the screen from the picture, and that's pretty much what happened. Like it just blew up the face entirely." The witness identified Exhibit 36 as "supposed to be the photograph of the robber" and said that both photos were distorted from the pictures he had seen on the screen, that "[t]hese are not the guys I picked" and that

"these are the photographs they handed me as being the robber here and the shooter here, and I disagreed * * * [b]ecause of the facial features, that they're wrong." Although the trial court ruled that it would not admit one photograph without the other, under the circumstances evinced in Wynne's testimony, it cannot be said that the rejection of Exhibit 35 was error (see *Alberti v New York, Erie & Western R. R. Co.,* 118 NY 77; *Nies v Broadhead,* 75 Hun 255, 256; *Catanese v Quinn,* 29 AD2d 675; McCormick, Evidence [2d ed], § 214; Richardson, Evidence [Prince—10th ed], § 137; Fisch, New York Evidence [2d ed], § 142, p 82).

[2, 3] The name and address of Oliver Smith was listed in the People's alibi notice of rebuttal. The People did not call Smith but the defendant did call him as a surrebuttal witness, whereupon he testified that he gave to the Yonkers police a signed statement dealing with the case and that he "had made [the] statement under duress." At that point, an objection was made and sustained. In discussing the ruling, defense counsel stated, relating a conversation he had with Smith, that Smith had been taken to a precinct in New York City where he was interrogated, that a day or two later he was picked up by New York City police in the company of a Yonkers detective or two and taken to a second New York City precinct for questioning, that at this juncture he told "them" he was on parole and "they" said "Well, look, Smith, just by being in this headquarters you are in violation of parole", that they prodded him as to when he last saw Davis, that at a fourth interview in Yonkers Smith said "Look, fellows, you write down anything you want about what I know, and I will sign it", and that, as counsel understood it, the statement says he saw Davis in New York during the middle of September, 1974. While a party's attempt to procure false testimony or to corrupt a witness, though collateral to the issues, is competent as an admission by acts and conduct that the party's case is weak and its evidence dishonest *(Nowack v Metropolitan St. Ry. Co.,* 166 NY 433, 437) and while the fact that evidence was fabricated is admissible even though the evidence itself was not used (see 1 Wharton's Criminal Evidence [13th ed], § 218), there is no indication, much less proof, of falsification on the part of the police or misconduct such as bribery of a witness nor any "fastening" of such wrongdoing to the prosecution (see McCormick, Evidence [2d ed], § 273, p 660). Here, the

statement signed by Smith was not offered or received in evidence.

[4, 5, 6] Relevant evidence has been defined as evidence having any tendency in reason to prove any material fact (Uniform Rules of Evidence, rule 1, subd [2]). It tends to convince that the fact sought to be established is so *(People v Yazum,* 13 NY2d 302, 304). Relevance, however, is not always enough, since "even if the evidence is proximately relevant, it may be rejected if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties" (Richardson, Evidence [Prince —10th ed], § 147, p 117; see, also, *People v Harris,* 209 NY 70, 82; McCormick, Evidence [2d ed], § 185, pp 438-440). Since the attempt to introduce Smith's testimony on a collateral issue was for the obvious purpose of creating the impression that a substantial portion of the prosecution's proof was tainted in a fashion similar to the proffered Smith account, the probative value of the testimony could be outweighed by dangers that the main issue would be obscured, by prolongation of trial and by the solid possibility of undue prejudice to the prosecution. Therefore, the discretion of the trial court was not abused (see *Radosh v Shipstad,* 20 NY2d 504, 508; Fisch, New York Evidence [2d ed], § 3, p 5).

[7] There is no merit to defendant's assertion of error because of the denial of a new trial. The newly discovered evidence which formed the basis of the motion consisted of a copy of an airline schedule, purportedly to prove that defendant could not have returned by air to New Orleans from the New York area after the commission of the crime on September 17, so as to have been seen by the Johnsons in New Orleans early on the morning of September 18. Such proof would be relevant only if one accepted the alibi testimony of defendant, his relatives and friends, which proof was not accepted by the jury. It is conceded in appellant's brief that defense counsel was aware during trial of certain airline schedules and that "very close to the end of the trial * * * a local travel agent acquainted the defense with a publication known as the Official Airline Guide published by Reuben Donnelly in Chicago." It is a portion of this Donnelly publication which defense seeks to introduce as new evidence, yet

significantly no application was made during trial for an adjournment to secure it. In any event, the evidence was not "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 330.30, subd 3).

II

The second appeal involves a judgment of the Supreme Court, Kings County, convicting Joseph James of murder, first degree; murder, second degree; attempted murder, second degree; assault, first degree; criminal possession of a weapon, second degree; and escape, second degree; and sentencing him to death for murder in the first degree and to concurrent prison terms for the other crimes. This, too, is a direct appeal.

There was proof that, on the morning of September 9, 1975, James, in the custody of Officers Connor and Motchan of the New York City Department of Corrections, was escorted to the dental clinic at the Kings County Hospital for examination. At that time defendant was incarcerated awaiting trial on an unrelated murder charge. While waiting for X rays to be taken defendant, cuffed to Motchan, asked to go to the lavatory. Motchan, unarmed, went into a bathroom with defendant and removed a chain from defendant's wrist. Connor, who was armed, remained outside. Defendant seized a pistol, which had been secreted at his request in the bathroom earlier in the day by his girl friend, and confronted Officer Motchan with the weapon. Motchan opened the door and warned his colleague that defendant had a gun, whereupon defendant shot and killed Motchan. Defendant then fired at and hit Connor twice, shot a patient-bystander and escaped from the hospital. Defendant did not take the stand.

Defendant's brief and reply brief in this court contain points to the effect that the trial court's *Sandoval* rulings constituted prejudicial error requiring a retrial and that said court violated the principles of *Witherspoon v Illinois* (391 US 510) in dismissing six persons in the venire. After filing said briefs, defendant's appellate counsel, orally and in writing and with defendant's concurrence after a discussion with trial counsel, has requested the court "not to consider, and treat as withdrawn" these arguments for relief as well as any portion of the point in said briefs to the effect defendant was not proven guilty of murder in the first degree beyond a reasonable doubt, which could be construed as arguments for a new trial. While

these grounds, as to which there has been such a request and withdrawal and for which a reason has been ascribed, are deemed without merit, in the context of our adversary system there is no reason to interfere with this appellate strategy involving a conscious choice not to raise certain issues (see *People v De Renzzio,* 19 NY2d 45, 50-51; *Ennis v Le Fevre,* 560 F2d 1072; cf. *People v DiPiazza,* 24 NY2d 342, 352; *People v Castro,* 19 NY2d 14, 17-18).

III

[8] We all agree that as to defendant Davis, while the facts support a conviction of the crime of murder in the second degree, there has not been proof of guilt beyond a reasonable doubt as to all of the elements of the crime of murder in the first degree. After careful review, there continues to be doubt among us concerning whether the victim, Officer Woods, was acting in the line of duty when he was killed, which is one of the elements of murder in the first degree as specified by our Legislature (Penal Law, § 125.27, subd 1). Accordingly, as to defendant Davis we conclude on nonconstitutional grounds that his guilt of murder in the first degree has not been established, and thus do not reach the constitutional issue as to him.

IV

[9] On the other hand, as to defendant James we conclude that there has been proof beyond a reasonable doubt of his guilt of murder in the first degree, for which he has been sentenced to death, and thus now consider his contention that the statutory death penalty provisions under which he was sentenced are unconstitutional. Section 60.06 of the Penal Law, pursuant to which these sentences were imposed provides that "[w]hen a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death." Thus, when read with section 125.27,[1] New York has enacted a death penalty statute which positively provides for a mandatory death sentence for all persons over 18 years of age found to have intentionally caused the death (1) of a police officer in the line of duty where defendant

1. Section 125.27 of the Penal Law, entitled "Murder in the first degree", added by section 5 of chapter 367 of the Laws of 1974 and effective September 1, 1974 (see Appendix).

knew or had reason to know the victim was such an officer, or (2) of an employee of a State correctional institution or local correctional facility under such circumstances (as specified in [1]), or (3) of anyone if defendant was confined or in custody for a life term or upon an indeterminate sentence with a maximum of life and a minimum of at least 15 years or if defendant had escaped from such confinement or custody and had not yet been returned.

[10, 11] We approach our consideration of this issue with full recognition that the State statutes under scrutiny carry with them a strong presumption of constitutionality, that they will be stricken as unconstitutional only as a last resort and that courts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation. As stated by Justice BLACKMUN in his dissent in *Furman v Georgia* (408 US 238, 411): "We should not allow our personal preferences as to the wisdom of legislative * * * action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great". At the same time, it must be kept firmly in mind that this court, as other State courts, is bound by rulings of the United States Supreme Court as to the validity of State statutes under the United States Constitution *(Magnolia Petroleum Co. v Hunt,* 320 US 430, 438; *Bourjois Sales Corp. v Dorfman,* 273 NY 167, 171).

The Eighth Amendment to the United States Constitution provides that "cruel and unusual punishments [shall not be] inflicted", and the Fourteenth Amendment by its due process clause prohibits the infliction of such punishment by a State *(Francis v Resweber,* 329 US 459, 463). In *People v Fitzpatrick* (32 NY2d 499, 512-513), in considering former death penalty statutes in this State (Penal Law, former §§ 125.30, 125.35), this court stated that "[s]ince * * * the New York statute * * * challenged * * * leaves infliction of the death penalty solely to the discretion of the jury, we conclude, in light of the Supreme Court's reading of the Eighth Amendment in *Furman [v Georgia]* (408 U. S. 238, *supra),* that we have no alternative but to hold that that penalty constitutes cruel and unusual punishment within the sense of that provision". Since that decision, New York has enacted section 125.27 of the Penal Law (L 1974, ch 367, § 5) which specifies the instances when murder in the first degree is committed and which incorporates two affirmative defenses applicable to those in-

stances—that "defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" and that "defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide."

Since the enactment of section 125.27, the Supreme Court has issued several opinions concerning State statutes revised in an effort to conform to *Furman v Georgia*. In *Gregg v Georgia* (428 US 153), the plurality opinion of the court summarized, at page 195, that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that *the sentencing authority is given adequate information and guidance*. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which *the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information"*. (Emphasis added.) In *Woodson v North Carolina* (428 US 280, 304), it was held that "the fundamental respect for humanity underlying the Eighth Amendment * * * requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death". In *Roberts (Stanislaus) v Louisiana* (428 US 325), it was made clear that this principle applies even where the crime of first degree murder is narrowly defined. There it was stated at page 332: "That Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina is not of controlling constitutional significance. The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute." This analysis is not based simply on the Supreme Court's conclusion that mandatory death sentences are unduly harsh insofar as they fail to take into account mitigating circumstances; it is also based on the historical fact that "[a]t least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict" *(Woodson v North Carolina*, 428 US 280, 293, *supra)*.

[12] Based on these statements, since New York's statute provides neither for the furnishing of information, without which there cannot be consideration of the individual offender and the circumstances of a particular offense, nor standards to guide the sentencing authority in the use of that information had it been furnished, unconstitutionality is certainly indicated. Indeed, since the statute requires by its terms a mandatory death penalty for the enumerated crimes, it is indistinguishable from those death penalty statutes found unconstitutional in *Woodson v North Carolina* (428 US 280, *supra)* and *Roberts (Stanislaus) v Louisiana* (428 US 325, *supra).* (See *People v Velez,* 88 Misc 2d 378 [McQuillan, J.].)

Any doubt concerning the question of constitutionality, however, has now been removed and has been firmly resolved by the Supreme Court in *Roberts (Harry) v Louisiana* (431 US —, 97 S Ct 1993). It is decisive. There, Harry Roberts was indicted and convicted of first degree murder of a police officer, engaged at the time of his death in the performance of his duties, and, as required by Louisiana statute (La Rev Stat Ann, § 14:30), was sentenced to death. There, in view of prior holdings (see 431 US —, n 7), a majority of the Supreme Court, with clarity and direction and without obfuscation, stated (p —, 97 S Ct 1995-1996):

"To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

"As we emphasized repeatedly in *Roberts* and its companion cases decided last Term, *it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.* Because the Louisiana

statute does not allow consideration of particularized mitigating factors, it is unconstitutional". (Emphasis added.)

[13] So, too, plainly and simply and without verbiage, because the New York statute "does not allow consideration of particularized mitigating factors" for purposes of "the capital sentencing decision" as to "the particular offender", it is unconstitutional.

[14] That the statutory framework may in some manner reflect various mitigating factors as defenses is not enough to save New York's death penalty statute from constitutional infirmity. Similar defenses are found in other jurisdictions, including those whose death penalty statute has been held unconstitutional by the Supreme Court. For example, Louisiana has many of the same defenses found in the New York statutes: (1) "sudden passion or heat of blood" in given circumstances may reduce a homicide to manslaughter (La Rev Stat Ann, § 14:31, subd [1]); (2) justification is a defense to prosecution for a crime (§ 14:18); (3) incapacity to distinguish between right and wrong because of mental disease or defect is a defense (§ 14:14), and intoxication may preclude specific criminal intent (§ 14:15). Similar to New York's defense of duress (Penal Law, § 40.00) is Louisiana's justification defense of compulsion, but such is not a defense to murder in that jurisdiction (see La Rev Stat Ann, § 14:18, subd [6]). In addition, Louisiana has a defense of infancy (§ 14:13), as does New York (Penal Law, § 30.00), but its statute does not set forth a specific age limitation in the case of capital crimes. In this respect, however, under the recent decisions of the Supreme Court the exclusion of an entire category of offenders under 18 years of age by New York (Penal Law, § 125.27, subd 1, par [b]) from punishment by death is not a mitigating factor since such limitations do not afford individualized consideration of the offender *(Rockwell v Superior Ct. of Ventura County,* 18 Cal 3d 420, 438). Aside from the fact that Louisiana's law includes many of the same defenses, examination of the statutory defenses reveals their inadequacy as a solution to the constitutional deficiencies of New York's death penalty statute.[2]

The problem lies partly in the distinction between a defense as that term is used in criminology and mitigating factors as

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2. We are advised that this argument—that New York's defenses reflect mitigating factors—was presented to the Supreme Court (see brief of the Attorney-General of State of New York as *amicus curiae* in *Roberts [Harry] v Louisiana, supra).*

described by the Supreme Court. The answer does not turn on whether mitigating factors may be considered at the guilt portion of the trial or whether such factors may be elevated to defenses. The problem is of greater magnitude than mere procedure or form. In a statutory framework where there is no distinct consideration of mitigating factors, there is an inherent fallacy in the notion that defenses provide the same function or are as good as or even better than separate consideration of such mitigating factors. The fundamental error in the reasoning is that defenses relate to guilt or innocence whereas a mitigating factor may be of no significance to a determination of criminal culpability. This was recognized in *Gregg v Georgia* (428 US 153, 190, *supra),* when it was noted that "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question." The point is that what is urged in mitigation will often not rise to the level of a defense. For example, in considering the third question of the Texas statute, which asks whether the conduct of the defendant was unreasonable in response to any provocation by the deceased, it was remarked: "This might be construed to allow the jury to consider circumstances which, though not sufficient as a defense to the crime itself, might nevertheless have enough mitigating force to avoid the death penalty—a claim, for example, that a woman who hired an assassin to kill her husband was driven to it by his continued cruelty to her" *(Jurek v Texas,* 428 US 262, 272, n 7). In short, statutory defenses alone do not take the place of a distinct consideration of mitigating factors, and this is all the more so where those defenses do not include a significant portion of what first the plurality and now the majority of the Supreme Court has emphasized should be examined—the character and record of the defendant.

The plurality of the Supreme Court was careful to state that it was not suggesting that a finding of constitutionality was dependent on following exactly the procedures used in those statutes upheld by it, instead explaining that "each distinct system must be examined on an individual basis" *(Gregg v Georgia,* 428 US 153, 195, *supra).* But, except in circumstances not relevant here,[3] the common thread running through the

3. The Supreme Court has reserved the question of whether or in what circumstances mandatory death sentence statutes may be constitutionally applied to prison-
(n. contd.)

court's analysis of statutes of other jurisdictions is that there should be a consideration of the "relevant facets of the character and record of the individual offender" *(Woodson v North Carolina,* 428 US 280, 304, *supra)* or, "the attributes of the individual offender" *(Roberts [Stanislaus] v Louisiana,* 428 US 325, 334, *supra).* This requirement was derived from the observation that traditionally a determination of what is an appropriate sentence requires an investigation of the "character and propensities of the offender" *(Gregg v Georgia,* 428 US 153, 189, *supra,* quoting from *Pennsylvania ex rel. Sullivan v Ashe,* 302 US 51, 55). Therefore, it was reasoned that the "futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender' " *(Roberts [Stanislaus] v Louisiana,* 428 US 325, 333, *supra,* quoting from *Williams v New York,* 337 US 241, 247).

[15] Of telling significance, the New York defenses do not take into account the character, propensity, record or attributes of the individual offender. This omission results from the simple fact that an unblemished record and evidence of prior good character has never been considered as a defense, and probably never will be. Of course, one may infer character from conduct, but the Supreme Court has indicated that a more individualized consideration is necessary. Hence, while there may be some visual or empirical satisfaction derived from counting and generally comparing the New York defenses with the mitigating factors indorsed by the Supreme Court, the fact is that these defenses do not require consideration of the character and record of the individual in respect to his sentence or punishment as mandated by the Supreme Court (see, e.g., *Roberts [Harry] v Louisiana, supra).*

This individualized consideration, with proper guidance and standards, is the crucial aspect of the sentencing decision. "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine" *(Jurek v Texas,* 428 US 262, 276, *supra).* New York's defenses simply do not present the re-

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ers serving life sentences *(Roberts [Harry] v Louisiana,* 431 US —, n 5, *supra).* Hence, we do not pass on the constitutionality of section 125.27 (subd 1, par [a], cl [iii]) of the Penal Law.

quired information and, if the defenses are not established, the defendant must be sentenced to death. New York's law does not permit a jury which has rejected these defenses and has found a defendant guilty of murder in the first degree to then mitigate the punishment by resurrecting the defenses. Indeed, this is implicit in our justification defense statute which states that "[t]he necessity and justifiability of * * * conduct may not rest upon considerations pertaining only to the morality and advisability of [a] statute" (Penal Law, § 35.05, subd 2; see Hechtman, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law, § 35.05, p 83).

Accordingly, the argument urging constitutionality fails for two reasons: initially, because the statutory framework does not permit the consideration of legally insufficient defenses as mitigating factors, and, more importantly, because these defenses do not present sufficient information about the character and record of the individual to allow a constitutionally permissible sentencing decision. Properly viewed, it is thus apparent that our statute is a mandatory capital punishment statute of the same type as has been struck down by the Supreme Court.[4]

V

[16] Under the Constitution of our State, in capital cases in which the sentence of death has been imposed, this court is vested with the power to and must review the facts (NY Const, art VI, §§ 3, 5; *People v Carbonaro,* 21 NY2d 271, 274). The scope of our inquiry into the facts in capital cases was defined in *People v Crum* (272 NY 348, 350): "A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt."

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4. Inasmuch as we have declared our death penalty statute unconstitutional under the United States Constitution and the decisions of the United States Supreme Court, we need not pass upon its constitutionality under the State Constitution.

[17] In summary, under the United States Constitution, the death penalty is not per se unconstitutional, but New York's statute, as presently written, in the absence of any provision in it for consideration of relevant and particularized mitigating factors, despite its narrow categories and various statutory defenses, is unconstitutional under recent holdings of the United States Supreme Court. Since we have determined under the decisions of the United States Supreme Court, the ultimate arbiter on the question, that the sentence of death as imposed on defendant James was invalid as a matter of law, that part of the judgment of conviction must be modified (CPL 470.15, subd 4, par [c]). In addition, as noted, as to defendant Davis we have determined on nonconstitutional grounds that his guilt of murder in the first degree has not been established beyond a reasonable doubt. However, based on our review of the records, as to the respective indictment counts charging murder in the first degree, we determine that in each case there has been a showing beyond a reasonable doubt of defendant's guilt of murder in the second degree in violation of subdivision 1 of section 125.25 of the Penal Law, and hence there should be a resentencing of each defendant.

As to appellant Davis, the judgment should be modified by vacating the sentence of death and the case remitted to Supreme Court, Westchester County, for resentencing and, as so modified, the judgment should be affirmed.

As to appellant James, the judgment should be modified by vacating the sentence of death and the case remitted to Supreme Court, Kings County, for resentencing, and, as so modified, the judgment should be affirmed.

APPENDIX

"A person is guilty of murder in the first degree when:

"1. With intent to cause the death of another person, he causes the death of such person; and

"(a) Either:

"(i) the victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

"(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional

facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; or

"(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and

"(b) The defendant was more than eighteen years old at the time of the commission of the crime.

"2. In any prosecution under subdivision one it is an affirmative defense that:

"(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

"(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

"Murder in the first degree is a class A-1 felony."

Chief Judge BREITEL (dissenting in part). I would modify in the Davis case to reduce the conviction to murder in the second degree on the ground that defendant's guilt of murder

in the first degree has not been established in law and in fact beyond a reasonable doubt. Consequently, it is not, in the Davis case, necessary or appropriate to reach any constitutional issue concerning New York's capital punishment statute. I would affirm in the James case on the ground that his guilt of murder in the first degree has been established beyond a reasonable doubt and that the New York statute appears to meet the latest tests for validity laid down by the United States Supreme Court.

The constitutional issue before the court is, as the majority opinion observes, not to be determined by the philosophical or penological predilections of the court or its individual members on the appropriateness of capital punishment as a sanction in a civilized society. Instead, the issue is whether Federal constitutional limitations allow the Legislature as the lawmaking representatives of the people to determine the values and judgments to be attached to the several factors influencing the choice of capital punishment as a sanction.*

Davis and James, defendants in unrelated criminal cases, each convicted of first degree murder and sentenced to death, appeal directly to this court (NY Const, art VI, § 3, subd b; CPL 450.70). One intentionally killed a police officer. The other intentionally killed a correction officer.

There are two issues. The first, given this court's power to review the facts in a capital case, is whether, in each case, the evidence justifies the jury's verdict (NY Const, art VI, § 3,

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* Speaking for myself alone among the dissenters I find capital punishment repulsive, unproven to be an effective deterrent (of which the James case itself is illustrative), unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values as to what are mitigating circumstances, and the brutalizing of all those who participate directly or indirectly in its infliction. This has been a lifelong view buttressed by over 40 years of experience as prosecutor, counsel to the Governor entailing 81 applications for commutation of capital sentences, Judge, member of the "National Crime Commission", witness before the British Royal Commission on Capital Punishment, and member of the American Law Institute and its Advisory Committee on the Model Penal Code. In all of these roles, when appropriate, I actively resisted viewing capital punishment as a proper or useful sanction for civilian crime. (With respect to the dubiousness of capital punishment as a deterrent, see Royal Commission on Capital Punishment, 1949 1953 Report, pp 18, 328-380; Sellin, The Death Penalty [1959], pp 19-63; President's Commission on Law Enforcement and Administration of Justice, Challenge of Crime in a Free Society, p 143; Model Penal Code, § 201.6, Comment [Tent Draft No. 9, 1959]; Temporary Commission on Revision of Penal Law and Criminal Code, Special Report on Capital Punishment [1965], pp 86-94, in NY Legis Doc, 1965, No. 25; Forst, Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's, 61 Minn L Rev 743).

subd a; CPL 470.30, subd 1). The second is whether section 60.06 of the Penal Law, providing capital punishment for first degree murder, an offense defined in narrow terms (Penal Law, § 125.27), violates Federal constitutional proscriptions of cruel and unusual punishment (US Const, 8th Amdt; see, also, NY Const, art I, § 5).

The evidence in the Davis case failed to establish beyond a reasonable doubt that the police officer killed was acting in the line of duty at the time he was shot. Hence, the crime of first degree murder was not made out and there should be a modification.

The judgment against defendant James should be affirmed. In his case, every element of first degree murder was established beyond a reasonable doubt. Because the New York statute defining first degree murder is so narrowly drawn, and because the statutory scheme takes into consideration possible mitigating factors by making them defenses to the substantive crime, it does not run afoul of constitutional limitations.

On September 17, 1974, Davis participated in an armed robbery of a supermarket. While his collaborator filled a canvas bag with money in excess of $5,000, Davis stood watch, relatively inconspicuously, just inside the exit door. Police Officer Woods, not in uniform, but about to report for work, had just paid for his purchases, apparently unaware of the ongoing robbery. As Woods attempted to leave the store, he was shoved by Davis and ordered to "get back in the store." Recovering and starting out for a second time, he was again repulsed. Angrily, according to one witness, he exclaimed, "What are you doing. I'm a cop." Davis responded with a statement, "You're a cop, huh", and a bullet, which felled Officer Woods. This exchange was corroborated by other witnesses. Davis and his cohort emptied another cash register, ordered everyone to the back, and left. Officer Woods, having suffered a severed spinal cord, died five days later of bronchopneumonia.

At trial, the proof of Davis' guilt was overwhelming. Six witnesses placed him at the scene; four of these witnessed the killing and identified Davis as the killer. In addition, an FBI informer testified to admissions made to him by defendant. The defense sought to place Davis in New Orleans at the time of the shooting, but his alibi witnesses failed to contradict convincingly the strong evidence presented by the prosecution.

Thus, the evidence leads, inexorably, to the conclusion that Davis intentionally killed Officer Woods.

There is no doubt whatever that appellant James is guilty of the killing of Correction Officer Motchan. For almost two months, James, jailed on a pending murder charge, with an impending probability of a life sentence, discussed his escape with a girl friend, Patricia Singleton, during daily telephone conversations. Then on September 7, 1975, on defendant's request, the girl friend procured a gun. After receiving further instructions from defendant on the morning of September 9, Miss Singleton left the gun in the lavatory in the Kings County Hospital Dental Clinic, where James had an appointment that day.

James was escorted to the clinic by two correction officers, Motchan and Connor. When defendant asked to use the lavatory, Officer Motchan, unarmed, accompanied him, while Officer Connor waited outside the door. After some scuffling in the lavatory, Officer Motchan emerged, without being able to close the door behind him, warning Connor that appellant had a gun. A shot from the lavatory hit Motchan in the back, mortally wounding him, and James, in the course of his escape, also wounded Officer Connor and an innocent bystander in the now-panicked waiting area.

James contended that the undisputed shooting was an "accident", caused by Motchan's stumbling as he left the lavatory. But the testimony of eyewitnesses does not support this contention, and defendant's continued shooting at other bystanders belies it. And if more be needed, there is defendant's desperate letter to a former girl friend, sent days before the attempted escape: "Listen, Debbie, I am very serious about what I am about to say. I am going to have an interview this week. I'm getting out of here or die trying. And if I die trying, you know me, that I am going to take someone with me".

Although it is beyond reasonable doubt that each appellant intentionally caused the death of his victim, in the Davis case, a police officer, and in the James case, a correction officer, that alone is not enough to establish a violation of section 125.27 of the Penal Law. The restricted scope of that section requires that the officer be "killed in the course of performing his official duties" (subd 1, par [a], cls [i], [ii]). As to this element, there was a failure of proof in the Davis case. True, decedent Woods announced "I'm a cop", provoking Davis to shoot him. But from those words alone, one may not draw

beyond a reasonable doubt the inference that Woods was acting in the line of duty. And there is no more. Woods might have uttered the words expecting only to induce Davis into moving aside and letting him continue on his way. Other likely explanations exist. The point is not that these inferences are any better than the one drawn by the prosecution; the point is rather that there is not evidence beyond a reasonable doubt to support any one inference more than another arising out of Woods' utterance. The result is that one may only speculate about the decedent's state of mind and his intentions. Davis' conviction must, therefore, be reduced to one for murder in the second degree.

The James case, by contrast, falls squarely within the proscription of the statute (Penal Law, § 125.27). What remains to be addressed is only the constitutional challenge to the statute mandating a sentence of death (Penal Law, § 60.06).

Section 125.27 of the Penal Law, defining first degree murder, is applicable only to three categories of intentional killing. The first two cover killings of police officers and correctional employees in the course of performing their duties, where defendant knew or reasonably should have known that the victim was a police officer or correctional employee (subd 1, par [a], cls [i], [ii]). The third category applies to defendants who were life prisoners or escaped life prisoners (cl [iii]). There are, significantly, two ameliorative provisions in the statute. First, a defendant may not be convicted of first degree murder unless he is at least 18 years of age (subd 1, par [b]). Second, it is a defense in a prosecution for first degree murder that defendant acted under the influence of extreme emotional disturbance (subd 2, par [a]).

It is now settled, for the nonce, at least, that capital punishment, per se, does not violate Federal constitutional prohibitions of cruel and unusual punishment *(Gregg v Georgia,* 428 US 153, 168-187; *Proffitt v Florida,* 428 US 242, 247; *Jurek v Texas,* 428 US 262, 268). Although the Supreme Court has held invalid mandatory capital punishment statutes covering a wide range of offenses, it has never been held that all mandatory capital punishment statutes are necessarily inconsistent with the Constitution (see *Roberts [Harry] v Louisiana,* 431 US —, 97 S Ct 1993; *Roberts [Stanislaus] v Louisiana,* 428 US 325; *Woodson v North Carolina,* 428 US 280). In fact, it has been noted, explicitly, that mandatory capital punishment

statutes applied to assaults or murders committed by prisoners serving life sentences might well pass constitutional muster *(Roberts [Harry] v Louisiana,* 413 US —, 97 S Ct 1993, 1996, n 5, *supra; Roberts [Stanislaus] v Louisiana,* 428 US 325, 334, n 9, *supra;* see *Gregg v Georgia,* 428 US 153, 186, *supra; Woodson v North Carolina,* 428 US 280, 292, n 25, *supra).*

The life prisoner presents a special case, according to the Supreme Court, because there may be no satisfactory deterrent other than the death penalty. But the court did not hold that only in the case of a life prisoner may a mandatory capital punishment statute be applied. Only a weak imagination would fail to perceive other cases just as special as that of the life prisoner. For instance, belief that a soldier is frightened of death and considering desertion in time of war may justify the threat of capital punishment to keep him at his station. And, of course, a prisoner like appellant James in the instant case, not yet sentenced to life imprisonment, but facing a murder charge which could well bring upon him such a sentence, presents a case no different from that of the life prisoner. Nor would the killing of a victim of or witness to a crime punishable by life imprisonment, to prevent successful identification and prosecution for the first crime, be of a different nature.

The Supreme Court has recognized, then, that mandatory capital punishment statutes applicable only in very special cases may not run afoul of constitutional limitations. It is not, however, necessary to decide whether all the categories of section 125.27 of the Penal Law constitute "special" cases, because the New York statute is not truly a "mandatory" capital punishment statute, as that term has been used by the Supreme Court.

Crucial are the statutory defense of extreme emotional disturbance and the limitation on conviction of first degree murder to persons more than 18 years old. These mitigating circumstances are precisely the kind of factors, specific to the offense or the offender, which the Supreme Court has required to sustain capital punishment statutes (see, e.g., *Gregg v Georgia,* 428 US 153, 193-195, n 44, *supra).* In fact, of the eight mitigating circumstances proposed by the Model Penal Code, and cited in *Gregg,* six are, in some manner, reflected in the New York statutory scheme: (1) extreme emotional disturbance is a defense to murder (Penal Law, § 125.27, subd 2, par [a]); (2) conduct causing or aiding another to commit suicide

may not bring a conviction for murder (Penal Law, § 125.27, subd 2, par [b]); (3) justification for the killing is a defense (Penal Law, art 35); (4) duress is a defense (Penal Law, § 40.00); (5) lack of capacity by reason of mental disease or defect is a defense (Penal Law, § 30.05), and intoxication may negative the intent to commit first degree murder (Penal Law, § 15.25; *People v Koerber,* 244 NY 147, 151-152; see *People v Jackson,* 14 NY2d 5, 7-8); and (6) only those over 18 years of age at the time the crime was committed may be convicted of first degree murder (Penal Law, § 125.27, subd 1, par [b]). (See *Gregg v Georgia,* 428 US 153, 193-194, n 44, *supra,* quoting ALI Model Penal Code, § 210.6 [Proposed Official Draft, 1962].)

It is notable that these are factors that the Supreme Court in the *Roberts (Harry)* case (431 US —, 97 S Ct 1993, 1995-1996, *supra),* relied on and quoted by the majority, stipulated as bearing upon the validity of a capital punishment statute. New York's statutory scheme is even better in raising these factors to complete or partial defenses.

True, other capital punishment statutes sustained by the Supreme Court have provided for consideration of mitigating factors after the jury has convicted defendant of the substantive offense *(Gregg v Georgia,* 428 US 153, 196-198, *supra; Proffitt v Florida,* 428 US 242, 247-253; *supra; Jurek v Texas,* 428 US 262, 268-274, *supra).* But there is no reason to assume that mitigating factors could not, instead, and even preferably, be built into the definition of the substantive offense. Indeed, the Supreme Court itself used similar analysis in *Jurek v Texas,* indicating that narrowing the categories of murders for which capital punishment may be imposed serves much the same function as listing aggravating factors for the jury to consider *(supra,* p 270). The situation is analogous where mitigating factors are involved. Certainly, if every possible mitigating factor were made a defense to the substantive crime, there would be little reason for the jury to consider mitigating factors in making a discretionary sentencing determination.

Section 125.27 of the Penal Law does not, of course, encompass every conceivable mitigating circumstance. But the Constitution does not require so much. It is essential only "that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense" *(Roberts [Harry] v Louisiana,* 431 US —, —, 97 S Ct 1993, 1996, *supra).*

Determining what circumstances are "relevant" must be a legislative, not judicial, task, at least once it has been determined that the Legislature has in fact decided to consider mitigating factors.

Nor in justice to the Supreme Court should it be assumed that that court would harden for all time under constitutional standards all conceivable categories of mitigating circumstances or that all must be accorded recognition, or that the procedure for their recognition must follow a particular pattern laid down by the court. It has had much too much trouble with this very problem not to be more flexible. The very caveats and provisos in its most recent opinions make this point explicit so that it is not necessary to have recourse to inference. Moreover, that court addresses constitutional principles and does not purport to write or dictate a statutory criminal code.

To recapitulate, it has never been held that all mandatory capital punishment statutes violate the cruel and unusual punishment clause of the Constitution. At least in a narrowly drawn category of special cases, a category which may be broad enough to include the entire New York statute, failure to provide for consideration of mitigating factors does not make a capital punishment statute constitutionally defective. But, in any event, the New York statute, although written in mandatory terms, is not embracively mandatory in that it does not encompass, indiscriminately and without consideration of mitigating factors, a mass aggregation of crimes. Thus, since section 125.27 of the Penal Law does require the jury to consider mitigating factors as elements of the substantive crime of first degree murder, there is no constitutional violation.

That the Constitution plays an important role in limiting the scope of capital punishment statutes is not now a matter of controversy. Unbridled jury discretion, because of possible discriminatory effects, must not be an element of the sentencing process in capital cases (*Furman v Georgia*, 408 US 238, reh den 409 US 902). At the opposite end of the spectrum, statutes which require mechanical application of the death penalty without any consideration of circumstances surrounding the crime and the criminal, are also unconstitutional (*Roberts [Harry] v Louisiana*, 431 US —, —, 97 S Ct 1993, 1996, *supra*; *Roberts [Stanislaus] v Louisiana*, 428 US 325, 333, *supra*; *Woodson v North Carolina*, 428 US 280, 304, *supra*).

But within the constitutional limitations, the decision to impose capital punishment at all, as well as the decision when it should be imposed, remains within the province of the Legislature. True, it has never been established that capital punishment is an effective deterrent. But there may be other reasons, unrelated to utilitarian considerations, to justify the death penalty. Whatever one thinks of capital punishment, the Legislature is entitled to conclude, rightly or wrongly, that the death penalty serves useful social purposes. Since the Legislature has so concluded, and has drawn a statute that comports with constitutional requirements, the statute should be upheld.

The ultimate issue is whether society through its Legislature or lawmaking body may determine the usefulness of capital punishment or whether Judges are empowered to do so, recognizing that capital punishment has been a sanction throughout the history of Anglo-American law. Progressively, lawmaking bodies have restricted more and more the use of that sanction. Rarely, although on occasion, has the sanction been reinvoked. England treated the matter legislatively and eliminated the sanction for murder (Murder [Abolition of Death Penalty] Act, 1965, c 71, as amd by Statute Law [Repeals] Act, 1973, and Statute Law [Repeals] Act, 1974). Many States of the Union have abolished capital punishment. The Supreme Court, both in *Furman*, and in subsequent cases, has never presumed to strike down the sanction as inherently invalid. It has only attacked the procedures used which allowed arbitrariness or compelled mechanical absolutist application across a broad range of homicide offenses. Nor has it ever presumed, in this troubled area, to deny the power of the Legislature to rely on the extreme sanction. Its greatest concern has been the racial discrimination which resulted from the arbitrariness allowed fact finders and sentencing courts under the old procedures (see *Furman v Georgia*, 408 US 238, *supra*). In the later cases it reacted to the brutality and undiscriminating mechanical application of the "absolutist" cure to the risk of arbitrariness in the "discretionary" procedures which had prevailed before (see *Woodson v North Carolina*, 428 US 280, *supra*; *Roberts [Stanislaus] v Louisiana*, 428 US 325, *supra*; *Roberts [Harry] v Louisiana*, 431 US —, 97 S Ct 1993, *supra*). These are the concerns which motivated the Supreme Court's treatment of the problem.

Accordingly, I dissent in part and vote to reduce the judg-

ment against appellant Davis to a conviction of second degree murder, and to remit the case for resentencing, and to affirm the judgment against appellant James.

Judges JONES, WACHTLER and FUCHSBERG concur with Judge COOKE; Chief Judge BREITEL concurs in a separate opinion in which Judges JASEN and GABRIELLI concur.

In *People v Davis:* Judgment modified and the case remitted to Supreme Court, Westchester County, for resentencing in accordance with the opinion herein and, as so modified, affirmed.

Judges JONES, WACHTLER and FUCHSBERG concur with Judge COOKE; Chief Judge BREITEL dissents and votes to affirm in a separate opinion in which Judges JASEN and GABRIELLI concur.

In *People v James:* Judgment modified and the case remitted to Supreme Court, Kings County, for resentencing in accordance with the opinion herein and, as so modified, affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1154

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH JAMES,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Question Presented for Review*

Whether the New York State Court of Appeals was correct in its holding that New York's capital punishment

* In oral argument before the New York Court of Appeals, respondent's counsel requested that court not to consider those aspects of the arguments presented in respondent's brief and reply brief which could be construed as arguments for a new trial. Specifically retained, however, were respondent's points with respect to the trial court's violation of the principles enunciated in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Respondent did concur with the State that if respondent prevailed on this argument, the appropriate remedy was reduction of respondent's sentence to life imprisonment without disturbing his conviction. The Court of Appeals evidently misunderstood respondent's request and treated the *Witherspoon* arguments as withdrawn, *People* v. *Davis and James*, 43 N.Y.2d 17, 28-29; 400 N.Y.S. 2d 735; 371 N.E.2d 456 (1977). Should this Court grant certiorari and eventually determine that New York's capital punishment provisions are constitutional, respondent requests that this case be remanded to the Court of Appeals for consideration of the *Witherspoon* arguments.

law (Penal Law §§ 60.06 and 125.27(1)(a)(ii)) violates the Eighth and Fourteenth Amendments to the Constitution of the United States because the statute fails to provide the sentencing authority with information as to the character, propensity, record or attributes of the individual offender and denies the defendant a fair opportunity to raise mitigating factors on the issue of punishment.

Statutes at Issue

§ 60.06 Authorized disposition; murder in the first degree

When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death.

Added L. 1974, c. 367, § 2 (McKinney 1975).

§ 125.27 Murder in the first degree

A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes the death of such person; and

(a) . . .

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility . . . and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-1 felony.

Added L. 1974, c. 367, § 5 (McKinney 1975).

POINT I

New York's Death Penalty Provisions Are Functionally Identical To Those Already Held Unconstitutional By This Court. Accordingly, The Review Sought Is Unwarranted.

In essence, the New York capital punishment statute is mandatory. If the jury finds that a defendant has committed any one of the three crimes described in section 125.27 of the statute, the court *must* sentence the defendant to death. There is no separate proceeding to determine the extent of the penalty; no opportunity for the defendant to introduce, or for the judge or jury to assess, evidence concerning the character or record of the defendant; no method

by which the defendant can raise mitigating circumstances to diminish the severity of his punishment; and no standards to guide the trial judge in imposing the penalty—other than the absolute command of death. In short, all defendants convicted receive precisely the same punishment.

This mandatory statute then is indistinguishable from those already held constitutionally offensive by this Court in *H. Roberts* v. *Louisiana,* 431 U.S. 633 (1977), and *Woodson* v. *North Carolina,* 428 U.S. 280 (1976). Consequently, the majority of the New York Court of Appeals correctly held that the New York statute could not stand in the light of these decisions. No useful purpose would be served were this Court to grant certiorari in this case and merely reaffirm the views already expressed in *Roberts* and *Woodson.*

Petitioners contend that this statute, or at least the conviction of the respondent, survives constitutional scrutiny because (a) the availability of certain affirmative defenses provides a defendant in a capital case with the option of presenting the jury with possible mitigating circumstances; and (b) the respondent was rightly sentenced to death because at the time he committed the homicide at issue, he had been indicted, but not convicted, of Murder in the Second Degree. We submit, for the reasons set forth in the succeeding sections of this brief, that the New York Court of Appeals correctly rejected these contentions, and that they lack sufficient merit to be considered by this Court.

Petitioners also argue in Point II of their brief (pp. 20-22) that this Court's recent decisions "have not given clear guidance to state legislatures" as to what would be a constitutionally satisfactory death penalty and that, therefore, a decision by the Court of the issues raised by petitioners

in this case would give "significant" guidance to those "across the country" now supposedly wrestling with the problem.

With all due respect, these observations are inaccurate and unrealistic. Decisions such as *Gregg* v. *Georgia,* 428 U.S. 153 (1976), and *Proffitt* v. *Florida,* 428 U.S. 242 (1976), have dispelled prior confusion and pointed the way plainly to a constitutionally acceptable capital punishment system. Even now, the New York State Legislature is in the process of considering such a bill,* drafted carefully on the model of the Georgia and Florida statutes, and no complaints have been heard that the applicable guidelines are unclear.

In point of fact, petitioners are faced with the dilemma of trying to shoehorn an outmoded, discredited mandatory statute into constitutional guidelines set by this Court which clearly reject such an approach. No legislature with an ounce of common sense or decent legal counsel would now wish to enact a statute similar to New York's when all one needs to do is to follow the example of those statutes which have been approved.** Consequently, we submit that the "issues of vital constitutional and societal importance" claimed by petitioners to be presented by this application (Petitioners' Brief, p. 23) do not, in fact, exist.

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* It has been approved by the State Assembly and will shortly be considered by the State Senate.

**Petitioners also argue that this would be an apt opportunity for the Court to resolve the issue left open in *Woodson* v. *North Carolina, supra,* 428 U.S. at 292, fn. 25 (among other cases) concerning the "lifer" who commits a homicide. As respondent was not a "lifer" at the time of the crime at issue here, that question would not be before this Court even were it to grant the petition.

POINT II

The Death Penalty Provisions Under Which Respondent Was Indicted And Tried, As Construed By The New York Court Of Appeals, Do Not Satisfy The Requirements Of The Eighth And Fourteenth Amendments.

A. New York's statutory provisions do not allow consideration of information concerning the character and record of the individual offender

A fatal flaw in New York's death penalty scheme is its failure to allow the sentencing authority to consider the character and attributes of the individual offender in deciding upon his sentence. As pointed out by the majority opinion in the state court, this constitutional deficiency is separate from, albeit related to, the "mitigating circumstance—affirmative defense" issue and, by itself, is sufficient to void the statute. *People* v. *Davis and James,** 43 N.Y.2d 17, 35-36 (1977).

For some time, this Court has emphasized the mandate of our society and Constitution that the sentencing authorities in a capital case have access to information concerning the character and record of the individual defendant whose life is at stake. As early as 1949, the Court noted that:

> "The belief no longer prevails that every offense in a like legal category calls for an identical punishment *without regard to the past life and habits of a particular offender.* This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . ." (Emphasis supplied.)

* Hereinafter referred to as *"People* v. *James"*.

Williams v. *New York,* 337 U.S. 241, 247 (1949). *See also Woodson* v. *North Carolina, supra,* 428 U.S. at 296-297; *S. Roberts* v. *Louisiana,* 428 U.S. 325, 333 (1976).

The importance of such access was underscored by the Court's 1976 capital punishment decisions. All three statutes then upheld by this Court at least allow presentation of information with respect to the defendant's character and record, and two of the statutes—those of Florida and Texas—require the sentencing authority to consider the defendant's past record or probable future conduct. *Gregg* v. *Georgia, supra,* 428 U.S. at 164; *Proffitt* v. *Florida, supra,* 428 U.S. at 251; *Jurek* v. *Texas,* 428 U.S. 262, 269 (1976). In *Jurek,* the Court stated that:

> "Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . [A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. . . . What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."

Jurek v. *Texas, supra,* 428 U.S. at 275-276. By contrast, an independent constitutional shortcoming of both the North Carolina and Louisiana statutes was their:

> "failure to allow the *particularized consideration of relevant aspects of the character and record of each convicted defendant* before the imposition upon him of a sentence of death." (Emphasis supplied.)

Woodson v. *North Carolina, supra,* 428 U.S. at 303; *see also S. Roberts* v. *Louisiana, supra,* 428 U.S. at 333; *H. Roberts* v. *Louisiana, supra,* 431 U.S. at 636.

New York's statute shares this shortcoming. Instead of receiving "all possible relevant information about the individual defendant," New York juries are not at any stage of a murder trial allowed to consider the character, past record, or probable future conduct of the defendant in reaching their determination as to his guilt or innocence. A similar stricture, of course, is imposed upon the trial court, which has no discretion in the matter of penalty once a verdict of guilty is returned.

The New York Court of Appeals was alert to this deficiency and found that the defenses permitted under New York's death penalty scheme simply:

> ". . . do not take into account the character, propensity, record or attributes of the individual offender."

People v. *James*, 43 N.Y.2d 17, 35 (1977).

This interpretation of New York's law by its highest court is not only legally binding (*see Green* v. *Neal's Lessee*, 31 U.S. [6 Pet.] 291 [1832]) but logically compelling. The availability of the affirmative defenses cited by petitioners is no answer; for, as Judge Cooke noted:

> ". . . an unblemished record and evidence of prior good character has never been considered as a defense, and probably never will be."

People v. *James*, 43 N.Y.2d at 35.

Of the six affirmative defenses cited by petitioners as alleged "mitigating circumstances," only two—the traditional infancy and insanity defenses—relate to the general character of the offender rather than to the specific circumstances of the offense. These two defenses, present to some extent in every death penalty scheme that has been struck down by this Court, say nothing about the offender's record or probable future conduct and thus fall far short of the con-

stitutionally mandated focus on "the particularized characteristics of the individual defendant." *Gregg* v. *Georgia*, *supra*, 428 U.S. at 206.*

Like Louisiana and North Carolina, New York cannot satisfy the Eighth Amendment by focusing on the offense and ignoring the offender. As the Court below found:

> "While there may be some visual or empirical satisfaction derived from counting and generally comparing the New York defenses with the mitigating factors endorsed by the Supreme Court, the fact is that these defenses do not require consideration of the character and record of the individual in respect to his sentence or punishment as mandated by the Supreme Court. . . ."

People v. *James*, *supra*, 43 N.Y.2d at 35.

B. New York's death penalty scheme does not allow consideration of mitigating circumstances as part of the sentencing decision

As noted above, a separate but related flaw in New York's statutory scheme is the fact that the jury and the trial judge are denied the right to consider *any* mitigating circumstances as part of the sentencing decision. This Court has repeatedly emphasized the constitutional mandate that "the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *H. Roberts* v. *Louisiana*, *supra*, 431 U.S. at 637 (1977). The failure to

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* Indeed, the Supreme Courts of both California and Maryland have held that exclusion from the death penalty of those under a certain age did not provide a constitutionally sufficient individualized consideration of the offender. *Rockwell* v. *Superior Court of Ventura County*, 18 Cal.3d 420, 134 Cal. Rptr. 650, 556 P.2d 1101, 1112 (1976); *Blackwell* v. *State*, 278 Md. 466, 365 A.2d 545, 549 (1976).

allow such a particularized consideration as part of the *sentencing* decision is the essence of a mandatory death penalty and the source of its constitutional infirmities: impermissible prejudice to the accused and unchecked jury discretion.

Recognizing this problem, petitioners contend that mitigating factors are, in essence, available to a defendant because, to some extent, such factors could be raised in the context of an affirmative defense. Thus, urge petitioners, mitigating circumstances may be incorporated into the definition of the substantive offense just like aggravating factors (*see Jurek* v. *Texas, supra,* 428 U.S. at 270-271; petitioner's brief at p. 13). This equation is unsupported by logic or justice.

Inclusion of an aggravating factor within the definition of an offense means that the state must introduce at trial and prove the existence of this additional element beyond a reasonable doubt in order to obtain a guilty verdict. The consequence, as this Court found, is that "the death penalty is an available sentencing option—even potentially—for a smaller class of murders. . . ." *Jurek* v. *Texas, supra,* 428 U.S. at 271. The effect of melding affirmative defenses with mitigating factors, however, is to place an intolerable burden on the defendant. Any time a defendant raises an affirmative defense, he runs a substantial risk of conviction because he is, in effect, admitting the homicide charged. He must bear the burden of proof and introduce at the guilt phase facts which, most likely, are prejudicial to the issue of whether or not he committed the homicide. In all likelihood, he will have to take the stand, thus exposing himself to cross-examination.

To subject a defendant, who merely wants to raise mitigating factors on the issue of his sentence, to the same

burdens and risks faced by a defendant seeking total exoneration by an affirmative defense would be wrong and unfair. As this Court noted in *Gregg* v. *Georgia, supra,* 428 U.S. at 190:

> "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."

The New York State Court of Appeals considered and rejected petitioners' argument with the following pertinent and practical observations:

> "there is an inherent fallacy in the notion that defenses provide the same function or are as good as or even better than separate consideration of such mitigating factors. The fundamental error in the reasoning is that defenses relate to guilt or innocence whereas a mitigating factor may be of no significance to a determination of criminal culpability. . . . The point is that what is urged in mitigation will often not rise to the level of a defense. For example, in considering the third question of the Texas statute, which asks whether the conduct of the defendant was unreasonable in response to any provocation by the deceased, it was remarked: 'This might be construed to allow the jury to consider circumstances which, though not sufficient as a defense to the crime itself, might nevertheless have enough mitigating force to avoid the death penalty—a claim, for example, that a woman who hired an assassin to kill her husband was driven to it by his continued cruelty to her' (*Jurek* v. *Texas,* 428 U.S. 262, 272, n. 7). In short, statutory defenses alone do not take the place of a distinct consideration of mitigating factors . . . ."

People v. *James, supra,* 43 N.Y.2d at 34.

The state court also pointed out that the Louisiana statute held unconstitutional by this Court in the two *Roberts* cases contains almost the very same affirmative defenses now urged by petitioners as constitutionally sufficient substitutes for mitigating factors. *People* v. *James, supra,* 43 N.Y.2d at 33.

Not surprisingly, therefore, every death penalty scheme that has been upheld by this Court has allowed consideration of mitigating circumstances as part of a sentencing decision distinct from the finding of guilt. *Gregg* v. *Georgia, supra; Proffitt* v. *Florida, supra; Jurek* v. *Texas, supra.*

Finally, there is the additional point that, even if the affirmative defenses could somehow suffice as mitigating factors, the jury is not and realistically could not be given any direction or guidance as to how to weigh these factors.* Like the mandatory statutes of North Carolina and Louisiana, New York's provisions do not guard against a jury's arbitrary exercise of discretion by providing "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson* v. *North Carolina, supra,* 428 U.S. at 303. Therefore, even if evidence of the defendant's character and record somehow filters into a trial, a New York jury is given no standards to guide its weighing of these or other factors against the effect of a conviction, nor is there any way for a reviewing court to learn what considerations were determinative in the jury's decision. As the Court of Appeals concluded:

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* For instance, could the jury be instructed to disregard, for purposes of guilt determination, a statement by a defendant that he committed the murder in question but that he did so under the influence of drugs and therefore does not deserve electrocution? Understandably, petitioners do not address this or similar questions.

> ". . . since New York's statute provides neither for the furnishing of information, without which there cannot be consideration of the individual offender and the circumstances of a particular offense, nor standards to guide the sentencing authority in the use of that information had it been furnished, unconstitutionality is certainly indicated." *People* v. *James, supra,* 43 N.Y.2d at 32.

POINT III

Respondent's Death Sentence Cannot Be Upheld By Consideration Of Charges Which He Was Given No Opportunity To Answer At Trial.

Claiming that respondent was properly sentenced to death because of the "interplay" of the victim's status as a correctional employee and respondent's then pending indictment for murder in the second degree, petitioners request this Court to uphold the death penalty as to respondent even if the provisions by which he was sentenced are deemed unconstitutional "in the general sense" (Petitioners' Brief, p. 15). In essence, petitioners are arguing that respondent's pending indictment branded him as a unique miscreant whose conviction of death should be reinstated notwithstanding the unconstitutional infirmities of the statute which barred him from introducing any countervailing evidence of his character or mitigating factors to move the sentencing authority towards mercy. Petitioners' argument is both factually inaccurate and constitutionally impermissible.

At no point in the trial was the jury apprised of respondent's status—they knew only that he was in a correctional institution and charged with an unnamed felony—so his status could not have been a factor in their finding of guilt.

In fact, introduction of evidence of respondent's earlier indictment, except possibly to impeach respondent's credibility had he testified, would have been grounds for a mistrial, since the earlier indictment was totally irrelevant but highly prejudicial to a finding of guilt under Penal Law § 125.27(1)(a)(ii) or to a sentence under Penal Law § 60.06. *See People* v. *Sandoval*, 34 N.Y.2d 371, 377; 357 N.Y.S.2d 849; 314 N.E.2d 413 (1974); New York Criminal Procedure Law § 280.10(1) (McKinney 1971). It would be even more improper to use respondent's pending indictment, which he had no opportunity to refute or defend at trial, as a retroactive basis for upholding his sentence.

There is also the obvious point that the New York statute does not call for the execution of one, under indictment for a crime that could carry a life sentence, who subsequently is convicted of a separate capital crime. As such, petitioners' request is not for a narrow construction of the statute but for its rewriting to add new elements to the crime—relief which only the New York Legislature, not this Court, can supply.

Lastly, even if the language of § 125.27(1)(a)(ii) limited its application to persons, like appellant, under indictment for crimes carrying a possible life sentence, it would still not be constitutional. This Court has repeatedly and emphatically limited the mandatory provisions that might be constitutional to those involving murder by a prisoner *serving* a life sentence, *Woodson* v. *North Carolina, supra,* 428 U.S. at 287; *S. Roberts* v. *Louisiana, supra,* 428 U.S. at 334; *H. Roberts* v. *Louisiana, supra,* 431 U.S. at 637 n. 5. The basis, at least in part, for this reservation is that such a narrow category may be justified because it is defined in part in terms of the character or record of the offender.

To argue that "there is no constitutionality [sic] significant distinction" between a lifer and a person merely

under indictment (Petitioners' Brief, p. 18) is to equate indictment and guilt and to sweep into the same mandatory death scheme a wide range of possible offenders, from innocent persons terrified by their wrongful indictment or their prison experience to hardened lifers for whom death is the only remaining possible deterrent. If the presumption of innocence means anything, the fact that someone is under indictment cannot be the basis for imposing on him a more severe penalty for a separate offense, on the grounds that his indictment reveals the turpitude of his character. Quite properly, therefore, this Court has not included persons under indictment in its category of persons for whom a mandatory death penalty might be valid.

CONCLUSION

For all of the foregoing reasons, the State's petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be denied.

Dated: New York, New York
March 28, 1978

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